THE

MONTHLY LAW REPORTER.

NOVEMBER, 1854.

THE CHIEF JUSTICES OF THE UNITED STATES.[1]

This is the first attempt that we know of in this country, to follow the plan of Lord Campbell in writing the lives of the Lord Chancellors and Chief Justices of England. Taking into consideration the brief period of time, not exceeding the term of a single life, and the comparatively scanty resources of the American author, we think he has produced a book interesting in itself and creditable to his industry and judgment in the selection and arrangement of his materials. Though we have not that long succession of events extending over a period of nearly eight hundred years, from which the English author could compile his work, yet to an American, at least, there is no period of equal length in history since the Conquest — history too, belonging both to England and America — so interesting or so important as that which commences at or shortly before the era of the formation of the existing government of the United States.

It is true that many of the events of our early history as a nation, have but little connection with the judicial history of the nation. They belong rather to the Cabinet, the Congress, and the Field; but in these events, in conducting the struggle with Great Britain, in forming the Constitution and in giving an impress to our institutions, the men who were afterwards called to administer the judicial system of the

[1] Sketches of the Lives and Judicial Services of the Chief-Justices of he Supreme Court of the United States. By George Van Santvoord. New York: Charles Scribner, 145 Nassau Street. 1854.

United States, acted prominent and distinguished parts. All those of the Chief Justices of the United States who have passed away, were born early enough to enact their part and make their mark in the formation and direction of the government.

It was well that the early direction of our destinies was in such hands. We think it must strongly impress any earnest student of that period of our history, immediately subsequent to the peace of 1783, down to the acceptance of the Constitution, that that acceptance or that any harmonious plan of union for the liberated colonies, was one of the most improbable events that could have been anticipated. The jarring interests of the North and South were to be reconciled, and the inequalities of opinion with regard to the extent to which the democratic principle should be adopted were to be brought to a level. It seems to us that never was a national birth surrounded with so many dangers; that never were the passions, the opinions, and the conflicting interests of men so providentially guided and overruled for ultimate good, as they were in that day of peril and of trial.

If the same jealous exasperation on the subject of slavery as now exists, had then sprung up, it is manifest that a harmonious union or any union would have been impossible, and it seems to us to be equally true, that if the union were now to be formed, the prevalence of the democratic spirit and of democratic passions would be an insuperable obstacle to its adoption. The very feebleness of the confederated States, their scanty population, their exhausted strength, their low estimation in Europe, and the fear of the contagion of their example, all appearing as they did at the time as the harbingers of ruin, were in fact the causes of our ultimate success and safety; for our individual weakness and the danger arising from foreign hostility, the pressure from without, were among the principal causes which repressed the working of our internal jealousies, and compelled us to lay aside our fears of each other, and unite in repelling or guarding against the common danger which impended over all of us, from the disaffection of foreign nations to our cause and their contempt of our weakness.

But the main cause of our success in obtaining the adoption of the Constitution or of any constitution, was the character which the revolutionary contest had impressed upon the people of the colonies, and more especially upon their great leaders and advisers.

There never probably existed in human history a people so pure, so single-minded, and at the same time so well informed, as were the people of the United States at the time when the Peace of Paris left them connected together by that rope of sand, — the old confederation. They had been made perfect through suffering. On the part of Great Britain, the war had been carried on in a spirit of savage exasperation. We were rebels, we were colonists, long believed, according to the theory of Buffon, to have degenerated in these western wilds from the parent European stock, and unworthy both by our character as rebels, and by our position in the scale of humanity, of the courtesies and forbearance exercised by nation towards nation in the conduct of civilized warfare. There was scarce a family, from which a husband, a son, or a brother, had not been drafted for service in the field. There was no State whose resources had not been exhausted by taxation and requisition, and in the track of the British armies as in that of Attila the Scourge of God, the grass had ceased to grow. The opportunities for individual enterprise were so scanty, the minds of men had become so national in presence of the all-absorbing interest of the mortal struggle for independent existence, that private and selfish interests seem to have been forgotten or laid aside as hopeless, and all hearts and all efforts concentrated upon the national contest. The consequence was that they came victorious out of the struggle, bankrupt in private fortunes, but anxiously hopeful for the future, with minds elevated and purified and strengthened by the trial, and with the firm and self-denying purpose, first to settle and to form the nation, and to make national prosperity the groundwork for whatever of individual success they might afterwards obtain. When such were the feelings of the mass of the people, it may well be supposed that their leaders could not have been behind them in patriotic self-denial. Washington's services throughout the Revolution, as afterwards during the eight years of his presidency, were without any other reward than the consciousness of duty well done, and the other lesser luminaries of the age, following the example of their revered chief, were actuated by the same spirit.

Among these men, either in the field or in the council, were the future Chief Justices of the United States — Jay, Rutledge, Ellsworth, and Marshall. We do not propose, in the brief limits of such an article as can be admitted to the

pages of this journal, to enter upon the biography of these men, or of their present honored successor. We refer our readers for this to the book itself. We only hope to call attention to the subject, and to notice cursorily some few thoughts that have struck our attention in glancing over the volume.

JOHN JAY was a federalist of the old school. He was not a member of the convention that adopted the Constitution, but he was earnest in its support, and was the author of a few of the papers of the "Federalist," the remainder and the largest part of which is from the pens of Hamilton and Madison. It was the influence of the federal party that secured the adoption of the Constitution, with whatever tendency it possesses towards centralization, and towards strengthening the hands of the general government at the expense of those of the States. It is well for us that so much strength has been secured to this government as to make it effective for all practical purposes. It is perhaps quite as well, that a strong democratic opposition, assuming the guardianship of State Rights, prevented the ultra federalists from carrying their theories of centralization any farther. Hamilton was in favor of a Senate and Executive for life, and Jay, in a letter to John Adams, expressed his desire "to see the people of America become one nation in every respect; for, as to the separate legislatures, I would have them considered, with relation to the confederacy, in the same light in which counties stand to the State of which they are parts, viz., merely as districts to facilitate the purposes of domestic order and good government."

The same spirit is shown in his remarks, in delivering his opinion as Chief Justice in the Supreme Court of the United States, in the memorable case of *Chisholm* v. *Georgia*, 2 Dallas, 472, 473, in which he seems to keep entirely out of sight the existence of sovereignty as appertaining to an individual State, and to consider the *State* of Delaware as of no higher dignity than the city of Philadelphia, merely because the former had no more inhabitants than the latter.

There are but few statesmen now among us who will agree with the extreme views of the primitive federalists — and we believe that it was fortunate for the destiny of this country that the democratic party succeeded in preventing those views from being carried any farther.

We cannot say that we think that the opinion of Chief Justice Jay, in this case, is a very sound one, and it has certainly been fortunate for the peace of the country that the conclusion which the court arrived at, was almost immediately overturned by an amendment of the Constitution.

We make one extract from the work before us, to show how entirely Mr. Jay was possessed by that spirit of self-sacrifice to which we have before alluded, as so characteristic of the men of the Revolution. He had been appointed, in 1779, envoy to Spain for the purpose, among others, of endeavoring to obtain a loan from the Spanish court.

The story of his daring self-devotion may be best told in the words of his biographer: —

"In this emergency Congress took an extraordinary step which nothing but desperation could have prompted. Without the slightest surmise of what might be Jay's reception or prospects of success in Spain, nay, without even apprising him of the step taken, it was resolved to draw upon him bills to the amount of half a million, payable in six months. The Spanish government, after authorizing the acceptance of these bills to the amount of a few thousand dollars, informed Mr. Jay that no more would be paid unless America agreed to furnish ships of war as an equivalent, or cede to Spain the sole right of navigating the Mississippi, but offered to guaranty the payment of $150,000 in three years, if Mr. Jay could effect such a loan. The conditions imposed by Spain were rejected; Jay attempted to effect the loan, but failed. In this emergency, he resolved upon a step of extraordinary boldness, it might be called rashness, a step, however, not hastily determined on, but one which his calm judgment dictated, and his reason approved. Without any present prospect of meeting these demands as they fell due, but with unshaken confidence in himself, his country, and its cause, he resolved *to accept all bills presented to him, at his own risk.*" — p. 25.

He persisted in this resolution. The bills thus accepted by him were not met, though he was soon relieved from his embarrassment through the agency of Dr. Franklin.

The most important single event in the life of Mr. Jay was his negotiation of the treaty, of 1794, with Great Britain. The biographer very reasonably doubts whether the terms of this treaty might not have been more favorable, had it not been for the ill-concealed, or rather the plainly manifested anxiety of Mr. Jay to procure a treaty of some sort with that power. At this day we can hardly wonder at the disfavor with which this treaty was received in the United States. Nothing but necessity could have justified its ratification, and it may well be doubted whether an undue regard for Great Britain did not then and for many a following year lead us into measures utterly

disparaging to the national honor, until at length our intolerable grievances gave occasion to the glorious war of 1812.

We cannot refrain from making one more extract in illustration of the estimate then made of public men, and which might well be applied to our own time.

"Of the proceedings of this Congress of 1774, it is not necessary now to speak. It was composed of fifty-five members. Among them were the distinguished orators from Virginia, Patrick Henry and Richard Henry Lee.[1] The debate was opened by Mr. Henry in a speech of matchless power and eloquence — a vivid and glowing description of which has been drawn by the graphic pen of Mr. Wirt. Richard Henry Lee followed, and charmed with his graceful eloquence an audience that had been spell-bound by the more potent declamation of his colleague. As he closed, Mr. Chase, a delegate from Maryland, whispered into the ear of one of his colleagues, 'we may as well go home; we cannot legislate with these men.' The whole assembly seemed to acknowledge their superiority. Lee was made chairman of the committee to prepare the address to the People of Great Britain; and Henry of the committee to prepare the address to the King. It soon became apparent, however, that their superiority consisted in powers of eloquence alone. The address of Lee fell far short of the high expectations that had been raised. Its reading disappointed the whole assembly. 'After all,' remarked Mr. Chase, with that quick perception and ready boldness which so strongly characterized his mind, 'they are but men, and *very common men, too.*'[2] After some faint and equivocal compliments, the address was laid on the table, and Gov. Livingston and John Jay were appointed upon the committee." — p. 9.

The successor of Mr. Jay in the office of Chief Justice was JOHN RUTLEDGE, of South Carolina. He was a member of a family distinguished by their ability and their zeal in the Revolution. He held the most important posts in his native State, and in the old Congress. He was appointed by Washington during the recess of Congress.

Mainly owing to his having actively opposed the ratification of Jay's treaty, his nomination was not confirmed by the Senate, and he retired from the bench after presiding during a single term, when he delivered opinions in only two cases, and very briefly on both. He soon after declined in health, ultimately became insane, and in the year 1800 he died. The case of *Talbot* v. *Janson*, 3 Dallas, 133, is however noteworthy as being the first case in the Supreme Court, where the right of a citizen to expatriate himself was made the subject of discussion.

After the rejection of Rutledge, Washington nominated Mr. Justice Cushing, the senior Judge of the Supreme Court,

---

[1] Professor Tucker remarks in his Life of Jefferson, that though Henry and Lee bore the palm for eloquence in debate, yet "for that of the pen, the first place must unquestionably be awarded to Mr. Jay of New York."

[2] Wirt's Life of Patrick Henry.

for the vacant office, and his nomination was at once confirmed. But he declined it, preferring to remain in the position he then held.

Oliver Ellsworth, of Connecticut, was then nominated and confirmed. Mr. Ellsworth was in Congress in 1778, and subsequently until 1782, which was his last year of service, and took an active part in the proceedings of that body. He was appointed to judicial office in his native State, and was a member of the convention which adopted the Constitution. He was very active and efficient in procuring the adoption of that principle in the Constitution which gives to each State an equal representation in the Senate. He was opposed to the tendencies towards centralization, and a strong advocate of the rights of the States. He was also a member of the Connecticut convention for ratifying the Constitution, and one of the first United States' senators from Connecticut, and was, as his biographer says, entitled to the chief paternity of the judiciary act of 1789. He was a supporter of Jay's treaty, and consequently voted against the confirmation of his predecessor, Rutledge, though no one has ever ventured to impugn his motives in so doing. He remained in the Senate until he was transferred to the bench as Chief Justice in 1796.

The opinions of Chief Justice Ellsworth are few and brief, and hardly afford materials from which we can infer his character as a judge. We can only pause to notice the case of Williams, occurring on the circuit for the Connecticut District, when the Chief Justice denied the right of a citizen to expatriate himself, a well-known recognized principle in the old common law, but one which we think is hardly suited to the spirit of the present age. While still holding his office as Chief Justice, Ellsworth was appointed one of the envoys on the second mission to France. When we read of the open rapacity and insolence which distinguished the Directorial government of France in their conduct to our envoys, and compare the history of that time with that of the period when President Jackson procured justice in the matter of the claims against France, that were settled during his administration, we cannot but congratulate ourselves upon the increased power and influence of our country.

This mission was a point on which the ultra federalists, with Hamilton at their head, began to cool in their support of the elder Adams, who showed signs of change in that ex-

cessive deference to Great Britain, which had been the hobby and the mistake of the federal party. By the time the envoys arrived in France, the revolution of the 18th Brumaire had taken place, and Napoleon was seated on the consular throne. The matters in dispute were put in the way of adjustment, and our claims against France were finally settled, as we have said, under the administration of President Jackson.

Before his return home, Ellsworth visited England, and Mr. Wharton, in his notes to the American State Trials, gives the following description, quoted in this volume, of a visit by him to Westminster Hall.

"It was, as is said, during the train of arguments, which are reported in the beginning of the first volume of Mr. East, that the American Chief Justice visited Westminster Hall. The famous case of *Rex* v. *Waddington* was then before the Court, in which all the leaders of the bar were retained, and at the inception of which a scuffle is said to have taken place near Mr. Garrow's Chambers, between the emissaries of the two contending interests, each seeking to be the first at the door of that eminent advocate. Mr. Law led off for the defendants in the proceedings in arrest of judgment, and was followed by Mr. Erskine, Mr. Garrow, and Mr. Scott. Notwithstanding Mr. Jay's previous appearance at the Court of St. James, and the contemporaneous presence there of Mr. King, the fame of their accomplishments had not reached the King's Bench, whose precincts they had probably never invaded; and it was, consequently, with great curiosity that the elder lawyers, whose notions of America had been derived from the kidnapping cases which were the only precipitate cast on the reports of the Privy Council, by the current of colonial litigation, spied out the American Chief Justice. Mr. Ellsworth's simple but dignified carriage, so much like, as is said, that of his successor on the bench, was in happy contrast to the awkwardness of the English Chief Justice; and as soon as it was discovered that, though his worn and marked features bore a stamp which had not then become familiar to the English eye, he was neither an Indian nor a Jacobin, two things regarded as equally beyond the limits of civilized sympathy, he was surrounded by a knot of lawyers, curious to know how the common law stood transplanting. Still, the obscurity which hung around the history of the American Republic, could not but produce some confusion; and it was with this view of the supposed creolishness of the American people — a hybrid between the Englishman and the Indian, mingling the distinctive powers of each without that power of perpetuating them, which the old philosophers thought belonged only to unmixed races — that Judge Grose, with an air, it is said, of grave delicacy, inquired whether the obstruction of the course of descent had not turned fee simples into life estates. Perhaps to the same uncertainty may be traced the question which Mr. Garrow is said to have addressed to the American Judge, 'Pray, Chief Justice, in what cases do the half-blood in America take by descent?'"— p. 286.

On his return, he resumed his judicial labors in his native State. He died in 1807, at the age of 63.

With the exception of that of Washington, no name in

American history shines with a greater or purer lustre than that of JOHN MARSHALL. He was born in 1755. A soldier during the Revolution, the superiority of his character was developed at an early age. He was present, and did good service at the battles of Brandywine and Germantown, and shared the sufferings of the army in the winter encampment at Valley Forge. He resumed his pursuits as a lawyer towards the close of the war, and served in various public capacities in Virginia. Being a candidate for election to the convention in that State for the ratification of the Constitution, he refused to give any pledge to oppose it, and was elected, and effectively promoted its adoption. He soon rose to eminence at the bar and in political life, with a private character fully equal to his public reputation.

We have not space for details. His distinguishing characteristics were his fearless independence and his steady sacrifice of expediency and interest to his convictions of right. He supported the British treaty at the risk of losing his popularity and influence in a community strongly opposed to it. He was a member of the mission to France, of the unworthy treatment of which we have already spoken.

The envoys refusing to accede to the infamous demands of Talleyrand and the Directory, he and Pinckney returned *re infecta*, leaving Gerry behind.

He was soon elected to Congress, and raised his reputation still higher by his celebrated speech defending the action of the government in the case of extradition of Thomas Nash, *alias* Jonathan Robbins. This speech may be found in the Appendix to Bee's Reports and in the Appendix to the fifth volume of Wheaton's Reports. After holding for a short time the office of Secretary of State under the elder Adams, he was appointed to the station of Chief Justice, which he so long illustrated and adorned, and in which, after a service of thirty-four years, he died. We cannot go into the history of his judicial career, and can only refer to what we all know — his invaluable services in modelling and giving stability and consistence to our judicial system.

He presided in his circuit at the trial of Aaron Burr, and under his ruling on the law, a verdict of not guilty was necessarily returned.

The following anecdote will illustrate his well-known character for independence.

"'Why did you not tell Judge Marshall that the people of America demanded a conviction?' was the question put to Wirt, after the trial. 'Tell *him* that!' was the reply. 'I would as soon' have gone to Herschel, and told him that the people of America insisted that the moon had horns as a reason why he should draw her with them.'"—p. 379.

Mr. Chief Justice Marshall had warm political feelings. He was a decided federalist, and his opinions of Jefferson's policy was such as to lead to personal dislike. Yet these feelings never led him to support party measures, which in conscience he disapproved, as was shown by his voting to repeal the second section of the sedition law, in opposition to his party.

In closing this notice, we merely refer to Marshall's Life of Washington as the principal literary production of the great Chief Justice. This work, though not interesting in point of style, is invaluable as a narrative of events, in many of which the writer was an active participator, and the bearings and import of all of which he understood as well, at least, as any man of his time.

Chief Justice Marshall died in July, 1835.

The only other Chief Justice of the United States is the present incumbent, Roger B. Taney, and the time has not yet arrived for making a complete estimate of his life and labors. He was born in Maryland in 1777, and is said, in the volume before us, to be descended from Dr. Mainwaring, a distinguished loyalist in the reign of Charles the First, whose services in the earlier period of that monarch's struggle with Parliament did much to exasperate the bad feeling between them, and drew upon himself the enmity of the Puritans. Chief Justice Taney is a sincere, but liberal, Roman Catholic, and is, we believe, the most noted public man of that faith who has borne any part in the national government. He attained a very high rank at the Maryland bar, and in 1831 came into President Jackson's cabinet as Attorney General. He stood firmly by the President in his attack on the United States Bank, and was brought prominently before the country in 1833 by his appointment to the Secretaryship of the Treasury, after Mr. Duane's refusal to carry into effect the measure of removing the deposits of the public money from the United States Bank. Mr. Taney acting, as we believe, from sincere and honest conviction, concurred in this measure, and was selected by

the President as the agent to carry it into effect. He has long since lived down the obloquy, so freely poured upon the author and agents in that transaction. Upon the death of Chief Justice Marshall, he was nominated to succeed him, and confirmed by the Senate after a vigorous opposition. It is but justice to make the following extract in relation to this contest:

"At the head of this opposition stood the acknowledged chiefs of their party, Messrs. Clay and Webster. The former of these, in particular, with the impulsive ardor of his nature, labored zealously to defeat the nomination, and signalized his assaults upon the nominee by an uncommon degree of asperity and bitterness of remark. I am informed by an eminent member of the Maryland bar,[1] who, though of opposite politics, was at the time warmly in favor of the confirmation of Mr. Taney, that Mr. Clay, not many years after, with the open and generous frankness of his nature, made the *amende honorable* to the Chief Justice, in a manner creditable alike to the characters of both. He frankly admitted to Judge Taney, that at the time of the nomination, he had used some harsh expressions, and made many unkind remarks in regard to him, which he sincerely regretted, adding, with a cordial shake of the hand, that he regarded him as a worthy successor of Chief Justice Marshall. It would have been difficult even for Mr. Clay to have framed a higher or more delicate compliment."—p. 489.

He took his seat in 1837, and has discharged his duties since that time with the universal approbation of the profession and the country. The volume before us presents a *resumé* of the most interesting cases of a public character which have been decided during his time.

In a series of cases which are noticed in the book before us, p. 493, *et seq.*, the opinions of the Chief Justice, and of a majority of the court were given, sustaining the constitutionality of State laws therein impugned. It cannot be denied, that it has been the tendency of the later decisions of the court to interfere less with the powers of the State than was the case in its earlier history.

This tendency has no doubt been produced, in part, by the strengthening of the democratic feeling manifesting itself in a jealousy for State rights. This tendency was a cause of great regret to many who had been familiar with the court in its earlier days, and more especially to Mr. Justice Story, who, after the decision in the case of the *Charles River Bridge* v. *Warren Bridge*, wrote to Mr. Justice McLean in the following terms:

"'There will not, I fear, even in our day, be any case in which a law of a State, or of Congress, will be declared unconstitutional, for the old constitutional doctrines are fast fading away, and a change has come over the

[1] The late Attorney General of the United States, Mr. Reverdy Johnson.

public mind, from which I augur little good. Indeed, on my return home, I came to the conclusion to resign. But my friends have interposed against my intention, and I shall remain on the bench, at least for the present.' "[1] — p. 497.

But it is our opinion that the evils that were anticipated from this change have not arisen, and will probably not arise. Recent events have shown that whatever may be the defects of the general government, they do not consist in want of strength or influence; and as every successful attack upon the acts of the States, tends either directly or indirectly to strengthen the central power, we think it a good omen for the future, that State legislation has been so much upheld in the Supreme Court of the United States. It is necessary, in such a system as ours, that the central government and judiciary should have some means of control over those of the States, but while such means exist, it is one of the surest signs of an harmonious and healthy action of the whole system, if it is exercised as seldom as possible at the expense of the subordinate power.

We must conclude this sketch with the closing words of the author, to the concluding paragraph of which we believe there will be a sincere and heartfelt response throughout the United States.

"We may point to Judge Taney as one of our best specimens of the American lawyer and jurist. His whole life, from earliest manhood, has been professional. He is one of the few really eminent men of the country who have scarcely any political history. With the single exception of the brief period, during which he filled the office of Secretary of the Treasury, in the Cabinet of General Jackson, he was never at any time entirely withdrawn from the studies connected with his profession. The few years of his service in the Maryland legislature, temporarily diverted his attention, but did not entirely interrupt his legal pursuits. His appointment as Attorney General of the United States introduced him merely to a wider theatre of professional action. He came to the bench, a deeply read, and profoundly learned lawyer — a master of the principles, and thoroughly skilled in the practice, of the law. He brought with him large acquirements, and the fruits of a ripe experience, and the result has been, that he has sustained himself with ability and honor, as the head of the Federal Judiciary, and has proved himself, in the words of Mr. Clay, 'a worthy successor of Chief Justice Marshall.'

"Long may he continue to fill that place, and to enjoy that merited distinction. To one like him, we may address, in no spirit of unmeaning adulation, the words of the Roman bard —

Serus in cœlum redeas."— p. 532.

---

[1] Story's Life and Letters. It may be added that Judge Story's chagrin arose mainly from the decision in the Bridge case, and that it was entirely disconnected from anything like personal feeling toward the Chief Justice and the majority of the court. In a letter written during the same term he remarks: "The Judges go on quite harmoniously. The new Chief Justice conducts himself with great urbanity and propriety," &c.

The volume before us appears to be written with ability and candor, and we consider it a valuable addition to our juridical literature.

There will be found in the notes, frequent and interesting sketches of the distinguished contemporaries of the Chief Justices at the bar, and on the bench, for which we can only refer our readers to the book itself.

ADMIRALTY REPORTS.

A SUIT *in rem* in the Admiralty, is a peculiar proceeding, known to no other branch of our customary law. It is a proceeding against a thing, and not between persons. In such a suit, the *res*, the *thing*, is the subject matter of the suit, and all the world are parties. Consequently, from time immemorial, these suits have been entitled after the vessel which is the subject of the suit, and not after any of the various and shifting parties who may intervene, at any stage of the cause, as libellants or claimants, originally or subsequently, for their various interests. The great Admiralty causes in which the leading principles of prize, of collision, of salvage, of wages, and of freight, have been decided, are known to the world, interestingly and picturesquely, by the names of the ships to which the incidents of capture, wreck, salvage, collision or service occurred. The Gratitudine, the Bold Buccleugh, the Woodrop Sims, the Two Catherines, the Jungfrau Catharina, the Amiable Nancy, the Agincourt, the Genesee Chief, the Fortitude, the Henry Ewbank, rich in associations, at once suggest to the mercantile lawyer the history of the cause and the principles of law which it was the occasion of developing.

Not only is this old nomenclature interesting, picturesque, and venerable, and also suited to the theory and fact that the *res* is the subject of the suit and all the world parties, but it is a style which has its convenience. It distinguishes a suit *in rem* in the Admiralty from all other suits, and it is much more easily remembered than the names of parties. The mind associates more easily the events of a voyage, the loss by fire, or flood, or sunken rock, the deliverance, the capture, the re-capture, the collision,

and the questions of law arising from these events, with the vessel which was their subject, than with the Browns, Joneses and Robinsons who had their various shares in the litigation. If, for instance, suits had been brought for aid rendered to the San Francisco, the Home, the Ocean Monarch, or the Arctic, to which all persons pecuniarily interested would have been necessarily made parties, how much more easily would the suits and the respective principles of each be recalled by the ill-fated names, than by the cognomens of any of the various merchants or mariners who happened to be at the head of the list of parties proceeding or intervening.

These thoughts are brought up in the mind of the mercantile lawyer by seeing the irregular and unscientific way into which many of our reporters have lately fallen, of entitling, in the reports, indexes, and digests, the Admiralty causes *in rem.* Sometimes the cause is entitled after the libellants and the thing libelled, as *John Doe and others* v. *The Neptune;* sometimes the reporter diligently hunts out the names of the parties *pro* and *con*, and entitles the suit after the manner of a suit at common law, while sometimes, where there are cross-libels, the vessels are even made respectively to libel and claim each other, and in appealed cases the parties are not unfrequently styled plaintiffs and defendants in error.

If our learned reporters would follow the simple and reasonable practice, which they will find always adhered to in the English Reports, and in the reports of those courts most conversant with Admiralty usages in America, they will save themselves and the profession some confusion, and spare the feelings of many whose sea-going affections and associations have been lacerated by these innovations, and who cannot bear to see the noble ship robbed of her immortality, and submerged beneath a crowd of ignoble names.

NOTES TO LEADING CRIMINAL CASES.

REGINA v. LOWE.[1]

July 19, 1850.

Criminal Negligence — Omission and Commission.

An act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter.

Where a man, appointed to superintend a steam-engine employed in a colliery, for the purpose of raising colliers from the pits, left the engine in the charge of an incompetent person, and in consequence of that incompetence, death ensued,

Held, that the man so leaving the engine was guilty of manslaughter.

THE prisoner was indicted for the manslaughter of Thomas Tibetts, on the 3d of June, 1850.

From the evidence in support of the charge, it appeared that the deceased was a collier, working in coal pits, and the prisoner was employed by Messrs. Jones and Darly, the owners of the pits, to attend the steam-engine by which the "skip," or basket, was raised up or let down the shaft of the pit with the workmen, on their way from and to their work. In the case of the men ascending the pit, it was the prisoner's duty to set the engine in motion to raise the skip until it reached about two feet above the surface or mouth of the pit, and then to stop the engine, so as to allow a "waggon" or platform to be moved over the mouth of the pit, and enable the men to get out of the skip with safety.

The prisoner, instead of attending at the engine, as was his duty, left it on the morning of the 3d of June, 1850, in the care of John Stockley, a lad fifteen years of age. Stockley remonstrated with the prisoner at the time, and told him that he, Stockley, would not work the skip. The prisoner replied that the witness was too idle to work it, but he would make him. The prisoner then went away to a public house.

During his absence the deceased, (having descended the pit early in the morning,) made the usual signal for the skip to be drawn up, by calling out to the boy stationed at the top of the shaft, whose duty it was in his turn to repeat the signal to the person having charge of the engine. In this instance the boy repeated the signal as usual, and Stockley set the engine to work, but failed in stopping it at the

[1] 4 Cox, C. C. 449; S. C. 3 Car. & Kir.

proper time, when the skip reached the surface with the deceased and two fellow-workmen. The failure was proved to be because "the skipper did not knock the engine up into the cap," Stockley stating that he did not know how to do it. The consequence was, that the skip was drawn up to the pulley over which the rope connecting the skip with the engine passed, and the deceased forced out, falling down the shaft, which was one hundred and seventy yards deep, and was of course killed.

At the close of the case for the prosecution,

Huddleston, for the prisoner, said he would take his lordship's opinion as to whether the facts, as proved, constituted the crime of manslaughter, or, in other words, whether a man whose duty it is to attend at a particular place or fill a particular office, and omits to attend, and leaves an incompetent person in his place, and death ensues, is guilty of manslaughter. In *Rex* v. *Allen and Clark*, 7 C. & P. 153, it was held that where a sailing vessel was run down by a steamboat in consequence of the improper steerage of the latter, arising from there not being a man at the bow to keep a lookout at the time of the accident, neither the captain or pilot could be convicted of the manslaughter of a person in the vessel run down. Parke, J., then observed — "Supposing the captain had put a man at the proper part of the vessel and gone to lie down, do you mean to say he would be criminally responsible? And you must carry it to that length if you mean to make any thing of it. And Alderson, B., said to the jury, 'There is no act of personal misconduct or personal negligence on the part of these persons at the bar.' A distinction appears to be taken between those cases where case or trespass would be, respectively, the civil remedy. In *Rex.* v. *Green*, 7 C. & P. 156, also, it was held that to make the captain of a steam-vessel guilty of manslaughter, in causing a person to be drowned, by running down a boat, the prosecutor must show some act done by the captain; and a mere omission on his part, in not doing the whole of his duty, is not sufficient. No doubt seems to have been expressed that, supposing the captain had gone down to bed, and the accident happened, that he could not have been responsible. In the present case the prisoner had gone away to a public house."

Lord Campbell, C. J. — I am clearly of opinion that an act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter, and

that there is evidence to go to the jury of such a criminal omission in this case.

Huddleston then addressed the jury on the question whether there was gross negligence, or, even if there was, whether the death of the deceased was caused by it.

Verdict, Guilty.

W. H. Cooke, and *E. V. Richards*, for the prosecution.
Huddleston, for the prisoner.

---

[1] It has sometimes been held, and not in harmony with *Regina* v. *Lowe*, that a negligent act of *omission*, is not punishable criminally; but that some positive act of negligence is necessary, in order to create criminal liability. See the opinions of Alderson, B. and Parke, J., in *Rex* v. *Allen*, 7 Car. & P. 153, A. D. 1835; and in *Rex* v. *Green*, Ib. 156.

These cases were indictments for manslaughter against the captain and pilots of a steamboat, for the death of a person on board of a smack, caused by running the smack down. The accident was attributed to the fact that a sufficient lookout was not kept at the bow of the steamer. Alderson, Baron, said to the prosecutor: "You put it as a case of a negligent act of omission. I have great doubt whether that amounts to manslaughter." And Parke, J., observed: "You must show some act done. You rather state it as if a mere omission, on the part of the prisoner, in not doing his whole duty, would be enough; and we are of opinion that it is not sufficient."

The soundness of any such distinction, however, as a general test of liability, may well be doubted, since a person is always bound by law to do his whole duty, and to positively perform all those acts which the law requires, as well as to abstain from doing those acts which the law prohibits. We see no reason why it should not be as censurable in law, as in ethics, to leave undone those things which ought to have been done, as well as to do those things which ought not to have been done. And indeed any such distinction is pointedly denied in the leading case of *Regina* v. *Lowe*, and the true and salutary rule of legal liability is expressly adopted and recognized.

And this is in analogy with the case of *Regina* v. *Spence*, 1 Cox, 352, A. D. 1846, where an English pilot, having the direction of a foreign vessel, failed to make the man at the wheel understand his orders, in consequence of which a boat was run down and a person in it killed. The point was taken that here there was no act of commission on the part of

---

[1] The following was accidently omitted at the close of the note on Hull's case in our September number: —

But before a parent, master, or guardian, can be criminally liable for *neglecting* to provide food, &c. for an infant child, it must appear that the person accused had the means and ability of supporting the child, and that such child had actually sustained bodily injury from the neglect. The mere fact of abandonment, or neglect, would not alone amount to a criminal offence. See *Regina* v. *Hogan*, 5 Eng. Law & Eq. R. 553: *Saunders' case*, 7 Car. & P. 277; *Regina* v. *Phillpot*, 20 Eng. Law & Eq. R. 591; *Regina* v. *Renshaw*, 2 Cox, 285. And see *Regina* v. *Vann*, 8 Eng. Law & Eq. R. 596; that if a parent has the means, he is bound to give his child a Christian burial, and if he neglects to do so, and leaves the body exposed in a public place, he is guilty of a nuisance. But if not of ability, he is not bound to borrow, beg, or steal, sufficient for that purpose.

From the first proposition above laid down, we proceed to the second, viz. *That acts of omission are punishable as well as acts of commission.*

This will be treated of in our next number.

the pilot. He gave the right order, but the foreign helmsman misunderstood him. Ld. Denman, and Alderson, B., both held that if the pilot produced the death by *any conduct* of his, he was guilty of manslaughter. And it was left to the jury whether the prisoner was guilty of negligence in not making the foreigners understand him thoroughly. Both of these cases seem hardly consistent with *Rex* v. *Allen*, and *Rex* v. *Green*, *supra*, but they seem to contain the better law.

In like manner, in *Regina* v. *Haines*, 2 Car. & Kir. 368, A. D. 1847, it was the duty of of the defendant, as ground bailiff of a mine, to cause the mine to be ventilated, by directing air headings to be put up where necessary. By his omission to do so in a particular case, the fire damp in the mine exploded, and several persons were killed. Upon an indictment for manslaughter, it was claimed by the prisoner, that as he was guilty only of a breach of duty by *omission*, he was not guilty of the crime, and that some wrongful or improper act was necessary, and *Rex* v. *Allen* was relied upon. But Maule, J. told the jury — "The prisoner is charged with manslaughter, and it is imputed, that in consequence of his omission to do his duty, a person named Shakspeare lost his life. It appears that the prisoner acted as ground bailiff of a mine, that, as such, his duty was to regulate the ventilation and direct where air headings should be placed, and the questions for you to consider, are, whether it was the duty of the prisoner to have directed an air heading to be made in this mine; and whether by his omitting to do so, he was guilty of a want of reasonable and ordinary precaution. If you are satisfied that it was the ordinary and plain duty of the prisoner to have caused an air heading to be made in this mine, and that a man using reasonable diligence would have had it done, and that by the omission the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter."

So in *Regina* v. *Pargeter*, 3 Cox, 191, A. D. 1848, the defendant was convicted of manslaughter for neglecting to give the proper signal to a railway train in motion, whereby a collision took place, and a passenger was killed. Although the case was strenuously defended, it was not intimated but that the defendant was liable for nonfeasance as well as misfeasance. On the same principle, Erle, J. ruled in *Regina* v. *Middleship*, 5 Cox, 275, A. D. 1850, that where a mother was delivered of a child while on a seat in a privy, if she had the means and power of procuring assistance and saving the child's life, but *neglected to do so*, she would be guilty of manslaughter.

But where an alleged crime consists in a mere breach of duty, it seems proper and perhaps necessary, that the indictment should positively allege that it was the prisoner's duty to do what was not done. See *Regina* v. *Barrett*, 2 Car. & Kir. 343, A. D. 1846.

And the same judge, and Martin, B., thought in *Regina* v. *Mabbett*, 5 Cox, 339, A. D. 1851, that if parents have not the means of providing proper food and nourishment for their infant children, who were incapable of taking care of themselves, and wilfully neglect to apply to the proper authorities for relief, knowing that such neglect is likely to cause the children's death, they are guilty of manslaughter, if death is thereby caused. We consider, therefore, the weight of authority entirely opposed to any sound distinction between acts of omission and commission in regard to criminal responsibility. If a greater degree of negligence is necessary as to the foundation of a liability *criminaliter*, than in civil cases, it may be that such degree was not proved in those cases where the distinction between omission and commission was first raised, which want of sufficient negligence may have been, in fact, the ground of the verdict of not guilty in those particular cases. However that may be, we think the true

law on this subject is laid down in our leading case of *Regina* v. *Lowe*.

But in order to create a liability criminally for neglect by nonfeasance, the neglect must be of some *personal* duty, the natural and ordinary consequences of neglecting which would be dangerous to life. There must be some direct and immediate connection between the neglect of duty, and the injury received, before the neglect can be considered a crime. Thus it has been held that the trustees of a road under an act of Parliament, whose duty it was *to contract for* the due repairs of the road, are not guilty of manslaughter in neglecting and omitting to contract for such repairs, whereby the road became dangerous, and a traveller was thrown out of a cart and died of his injuries. — Lord Campbell said the cases on this subject show a *personal* duty, the neglect of which has *directly* caused death ; and, no doubt, where that is the case, a conviction of manslaughter is right. But how do these apply to trustees of a highway? How can it be said that their omission to raise a rate, or to contract for the reparation of the road, directly causes his death? If so, the surveyors or inhabitants of the parish would be equally guilty of manslaughter; for the law casts upon them the duty of keeping the roads in repair. To uphold this inquisition would be to extend the criminal law in a most alarming manner, for which there is no principle or precedent. E. H. B.

Regina v. Longbottom and another.[1]

March 19, 1849.

Criminal Negligence — Negligence of both Parties.

Wherever death ensues from injuries inflicted by parties engaged in any illegal act, an indictment for manslaughter will lie, even though it appear that the deceased had materially contributed to his death by his own negligence.

The indictment charged, that the two prisoners feloniously killed and slew John Truman, by driving over him with a gig.

O'Malley and *E. Rodwell*, for the prosecution, proved that the two prisoners, who lived in Ipswich, had gone to Bentley on the day named in the indictment in a gig, and that on their return at night they were observed to be in a state of partial intoxication. At several places they drove along the high road at a very rapid pace, and when they got within two miles of Ipswich they met three men. At that time they were laughing and driving rapidly down a hill, the top of which was thickly shaded with trees. When the three men got to the trees they found a man lying in-

[1] 3 Cox, C. C. 439.

sensible in the middle of the road, presenting all the appearance of having been just run over by some vehicle. They took up the man, who shortly afterwards died. On inquiry it turned out that the deceased was a man who had been deaf from childhood, but had, in spite of his infirmity, contracted an inveterate habit of walking at all hours in the middle of the road. Against the probable consequences of an indulgence in this habit he had been frequently warned, but without effect.

D. D. Keane, for the prisoner Longbottom, submitted, at the close of the case for the prosecution, that he ought to be acquitted, inasmuch as it appeared that the deceased had contributed in a great measure, if not altogether, to his own death by his own obstinacy and negligence. There was, moreover, no proof that the prisoners were driving at any extraordinary pace; while it appeared that they were in the middle of the road, and that the deceased was walking just where he ought not to have been, reference being had to the lateness of the hour, the darkness of the place, and his peculiar infirmity, which ought to have induced him to refrain from the selection of the most frequented part of the high road, as that on which alone he would walk. No accident could possibly have occurred to the deceased, if he had been at the side of the road, where foot passengers always walked. He had, therefore, contributed to his own death, and the question was, whether that fact did not exonerate the prisoner from such a charge as the present. This might be tested by analogy with a civil action under Lord Campbell's Act. Under that statute the representatives of the deceased could not maintain an action for compensation against the prisoners, as he had himself been guilty of negligence, so, in this prosecution, it was contended that the prisoners could not be convicted of the crime of manslaughter.

Rolfe, B.—I cannot stop the case; for whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed. I am of opinion that if any one should drive so rapidly along a great thoroughfare leading to a large town, as to be unable to avoid running over any pedestrian who may happen to be in the middle of the road, it is that degree of negligence in the conduct of a horse and gig which

amounts to an illegal act in the eye of the law; and if death ensues from the injuries then inflicted, the parties driving are guilty of manslaughter, even though considerable blame may be attributed to the deceased. I do not at all recognize the analogy which has been put with regard to an action under Lord Campbell's Act and a charge of felony; and I abstain from giving any opinion as to the question whether, under the circumstances here proved, the representatives of the deceased would be precluded from maintaining an action for compensation against the prisoners. But there is a very wide distinction between a civil action for pecuniary compensation for death arising from alleged negligence and a proceeding by way of indictment for manslaughter. The latter is a charge imputing criminal negligence, amounting to illegality; and there is no balance of blame in charges of felony, but wherever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law, though it may be that he ought not to be severely punished. If the jury should be of opinion that the prisoners were driving along the road at too rapid a pace, considering the time and place, and were conducting themselves in a careless and negligent way in the management of the horse entrusted to their care, I am of opinion that such conduct amounts to illegality, and that the prisoners must be found guilty on this indictment, whatever may have been the negligence of the deceased himself.

Verdict, Guilty.

Sentence — eight months' imprisonment.

D. Power was counsel for the other prisoner.

It is a familiar principle of law, in *civil* cases, that where an injury is produced by negligence, the injured party has no remedy against the other, if his own negligence concurred in producing the result. But this rule never obtained in criminal law, for, as it is clearly laid down by Rolfe, B., in the leading case, the party principally in fault, is as much liable, *criminaliter*, as if his own negligence was the sole cause of the injury. And perhaps the rule in civil cases is founded not so much upon the notion that the defendant is less culpable, because the plaintiff was also in the wrong, as upon the well settled principle, that the law will not favor a claim for *damages* by one, who by his own conduct has in part produced his own injury. And therefore we find that when the prosecution becomes criminal, and no private pecuniary benefit is sought, the negligence of one party does not remove the responsibility of the other.

The principal case was determined in 1849, but the same doctrine had been previously acted upon by Pollock, C. B., in *Regina* v. *Swindall & Osborne*, 2 Car. & Kir. 230, A. D. 1846. In that case "the prisoners

were indicted for the manslaughter of one James Durose." "The second count of the indictment charged the prisoners with inciting each other to drive their carts and horses at a furious and dangerous rate along a public road, and with driving their carts and horses over the deceased at such furious and dangerous rate, thereby killing him. The third count charged Swindall with driving his cart over the deceased, and Osborne with being present, aiding and assisting. The fourth count charged Osborne with driving his cart over the deceased, and Swindall with being present, aiding and assisting.

Upon the evidence, it appeared that the prisoners were each driving a cart and horse, on the evening of the 12th of August, 1845. The first time they were seen that evening was at Draycott toll-gate, two miles and a half from the place where the deceased was run over. Swindall there paid the toll, not only for that night, but also for having passed with Osborne through the same gate a day or two before. They then appeared to be intoxicated. The next place at which they were seen was Tean Bridge, over which they passed at a gallop, the one cart close behind the other. A person there told them to mind their driving: this was 990 yards from the place where the deceased was killed. The next place where they were seen was forty-seven yards beyond the place where the deceased was killed. The carts were then going at a quick trot, one closely following the other. At a turnpike-gate a quarter of a mile from the place where the deceased was killed, Swindall, who appeared all along to have been driving the first cart, told the toll-gate keeper, 'We have driven over an old man;' and desired him to bring a light and look at the name on the cart; on which Osborne pushed on his cart, and told Swindall to hold his bother, and they then started off at a quick pace. They were subsequently seen at two other places, at one of which Swindall said he had sold his concern to Osborne. It appeared that the carts were loaded with pots from the potteries. The surgeon proved that the deceased had a mark upon his body which would correspond with the wheel of a cart, and also several other bruises, and, although he could not say that both carts had passed over his body, it was possible that both might have done so."

And the point now under consideration was thus clearly explained by the learned Baron. — "The prisoners are charged with contributing to the death of the deceased, by their negligence and improper conduct, and, if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy against the other for damages. So, in order that one ship-owner may recover against another for any damage done, he must be free from blame; he cannot recover from the other if he has contributed to his own injury, however slight the contribution may be. But, in the case of loss of life, the law takes a totally different view — the converse of that proposition is true; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person. Generally, it may be laid down, that, where one by his negligence has contributed to the death of another, he is responsible; therefore, you are to say, by your verdict, whether you are of opinion that the deceased came to his death in consequence of the negligence of one or both of the prisoners."

The same principle is involved in the case of *Rex* v. *Walker*, 1 Car. & P. 320, in 1824, although it is not brought out as distinctly in the sum-

ming up to the jury. In that case the prisoner was indicted for manslaughter in killing Thomas Crates.

The deceased was walking along the road leading from Bristol to Bitton in a state of intoxication. The prisoner was driving a cart drawn by two horses without reins; the horses were cantering, and the prisoner sitting in front of the cart. On seeing the deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so; and one of the cart-wheels passed over him, and he was killed.

Garrow, B., laid down, that if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way; if from the rapidity of the driving, or any other cause, the person cannot get out of the way in time enough, but is killed, the driver is in law guilty of manslaughter; and that it is the duty of every man who drives a carriage to drive it with such care and caution as to prevent, as far as is in his power, any accident or injury that may occur.

Regina v. *Williamson*, 1 Cox, 97, A. D. 1844, also sustains the leading case upon this point. There the prisoner, a waterman, having overloaded his ferry-boat, with passengers, and the boat being driven by the swell of a steamer against the bows of another steamer, the passengers all jumped up and tried to lay hold of the steamer. The ferry-boat was thereby upset, and one passenger was drowned. The prisoner called out to the passengers to sit still, when the boat struck, but they did not heed him. Williams, J. said — "If the jumping up of the passengers really caused the accident, the overloading of the boat was immediately productive of such a result, and thus the prisoner is answerable, for he should have contemplated the danger of such a thing happening."

In analogy with this principle, if a man receives a wound from another, by which his death is produced, the party inflicting the wound is liable for the consequences, although the deceased might have recovered by the exercise of more care and prudence. *McCallister* v. *The State*, 17 Alabama, 434, A. D. 1850; and see *Commonwealth* v. *McPike*, 3 Cush. 181, A. D. 1849; *Rew's case*, Kelyng, R. 26, A. D. 1662; *Commonwealth* v. *Green*, 1 Ashmead, 289, A. D. 1826. In this case it was said, that even if a wound is not mortal in itself, but from want of proper applications, or neglect, it turns to gangrene or fever, and that gangrene or fever is the *immediate* cause of the death, yet the wound being the cause of the gangrene or fever, is the *mediate* cause of the death, and the inflicter of the wound is guilty of murder or manslaughter according to the circumstances of the case. And the same is laid down in 1 Hale, P. C. 428. *Regina Holland*, 2 Mo. & R. 351, A. D. 1841, is an important case upon this point. The deceased having been severely wounded by the prisoner, who had with an iron instrument cut off one of his fingers, *refused* to have his finger amputated, and soon after the lockjaw came on, and the finger was then amputated; but it was too late, and the lockjaw ultimately caused death. The surgeon testified that in his opinion if the amputation had taken place at first, the deceased would not probably have died. It was held, notwithstanding the death was *immediately* caused by the refusal to submit to proper treatment, that the person inflicting the wound was guilty of murder.

The same general principles obtain in the Scotch law. See Alison's Principles of the Cr. Law of Scot., p. 146 - 151. It may be going too far to say that no medical treatment of a dangerous wound, can be so grossly erroneous as to lessen the responsibility of the author of the injury; but it is conceived that if the jury can say that the death was chiefly owing to the wound, and not to the maltreatment, the original wrong-doer is responsible for the fatal consequences.

If the negligence of the deceased or his physician is no shield or defence for the negligence of the prisoner, *a fortiori*, the negligence of third persons who are co-actors with the defendant cannot be. The negligence cannot be distributed, and the blame divided; but all who are guilty of the negligence, are equally guilty of the crime. *Regina* v. *Haines*, 2 Car. & Kir. 368, A. D. 1847.

The line of distinction, however, between cases where the negligence of the deceased is so far instrumental in causing his death, as to render another not culpable, and the instances before given, where such negligence was considered no palliation, is acknowledged to be delicate. Thus in *Rex* v. *Waters*, 6 Car. & P. 328, A. D. 1834; it appeared that the prisoner was a seaman on board a schooner, lying in the river Thames, and the deceased was a person in the habit of going about in a boat among the ships in the Pool, selling spirits, purl, hot beer, &c., and that on the day in question, the prisoner and he had some dispute about paying for some spirits, and, both being intoxicated, a good deal of rough joking had taken place between them. The first witness for the prosecution swore, that the deceased's boat being alongside the schooner, the prisoner pushed it with his foot, and the deceased stretched out over the bow of the boat to lay hold of a barge, to prevent the boat from drifting away, and, losing his balance, fell overboard, and was drowned. Parke, J., after consulting with Mr. Justice Patteson, said they were both of opinion that the evidence did not show the prisoner guilty of manslaughter. E. H. B.

Recent American Decisions.

District Court of the United States, for the District of Massachusetts, September, 1854.

THE OSPREY.

Collision.

When a steamer meets a sailing vessel going free, it is the duty of the sailing vessel to keep her course, and the duty of the steamer to keep out of her way by all reasonable and practicable means in her power, without being restricted to going to the right or to the left, or to any other particular measure. — Law of Collision generally — General rules as to the course to be pursued by vessels approaching each other, to avoid collision.

THIS was a suit *in rem* promoted by Kenneth Urquhart and others, owners of the British brig Fanny, against the steamer Osprey, for a collision. At the same time a cross-libel was promoted by John Linton & Co. of Philadelphia, owners of the Osprey, against the brig Fanny. The two suits were tried together, upon the same evidence and arguments.

The facts of the case sufficiently appear from the opinion of the learned judge.

R. H. Dana, Jr., and *D. W. Gooch*, for the Osprey. The rules in the law of collision, which seem technical and arbitrary, will be found, on careful analysis, to be simple and founded in equity. All will be found to turn upon the consideration whether the two vessels meet on terms of equality or of inequality. If the former, the loss and labor of deviation is borne equally. If the latter, the vessel having the advantage, takes the whole duty upon herself, and the other vessel keeps her course. If the favored vessel *may* keep her course, she *must* do so, that the other vessel may know what to depend upon. Where both vessels are steamers, or both are close-hauled, or both are free, they are equal, and each keeps to the right. The rule where both are close-hauled, has usually been stated as though the vessel on the starboard tack was favored, but it is really only an instance of the rule that each keeps to the right. Where one is going free and the other is close-hauled, they are on an inequality, and the favored vessel takes the whole duty of avoiding the other, and the latter keeps her course. *The Gazelle*, 2 W. Rob. 517; *The George*, 5 Notes of Cases, 368; *The Woodrop Sims*, 2 Dod. 80; *The Speed*, 2 W. Rob. 223.

Where a steamer meets a sailing vessel close-hauled, it is well settled that the latter is to keep her course, and the steamer to get out of her way. *The Shannon*, 2 Hagg. 173; *The Columbine*, 2 W. Rob. 26; *The Gazelle*, Ib. 517; *The Birkenhead*, 3 Ib. 35; *The Vivid*, 7 Notes of Cases, 127.

Whenever one vessel is to keep her course, and the other is to take the whole duty of avoiding her, the latter, whether steamer or sailing vessel, is not restricted to going to the right, but may take any course and resort to any measures which are most judicious and convenient. *The Birkenhead*, 3 W. Rob. 75; *The James Watt*, 2 Ib. 270; *The Northern Indiana*, 16 Law Rep. 434; *The Leopard*, Daveis, 193; *St. John* v. *Paine*, 10 How. 556; *Newton* v. *Stebbings*, Ib. 590.

A steamer meeting a sailing vessel free, is a case of inequality, and should be governed by the latter rule. The proof, in this case, of a usage to that effect on the American coast is incontrovertible. It is founded in better

policy, because it gives one uniform rule in all cases of steamers meeting sailing vessels, and does away with all inquiries, at the time or afterwards, into the question whether the sailing vessel was close-hauled or free. It is also more equal. The judicial decisions in America favor this rule. *The Leopard*, Daveis, 193; *The Northern Indiana*, 16 Law Rep. 434; *St. John* v. *Paine*, 10 How. 556; *Newton* v. *Stebbings*, Ib. 590.

In the English cases heretofore cited, although the sailing vessels happened to be close-hauled, the rule was not restricted to those cases, and the case of the *Shannon*, 2 Hagg. 173, favors the uniform rule. The only case to the contrary is that of *The City of London*, 4 Notes of Cases, 40. In that case, the court follows a phrase instead of a principle, and feels bound to treat a steamer as a sailing vessel having the wind always free. That phrase was used in cases of steamers meeting vessels close-hauled, and was not intended to apply to and limit cases of steamers meeting vessels sailing free.

The rule we contend for is founded in usage, in policy, in equity, and is supported by the weight of judicial authority.

J. C. Park, for the Fanny, contended,

First. That upon the facts in the case, it appeared that the brig was coming up the harbor, about mid-channel, was holding her course nearly before the wind, and did not port her helm, until the steamer had put her helm to starboard, and veered to leeward; that then, it was done, to give the steamer more space and more time to "slow," "stop," and "reverse" her engine, and that she (the steamer) should have done this, and thus have avoided the collision.

Second. That if the brig did port her helm on discerning the steamer, she was right in so doing; — and reliance was placed on the opinion of Dr. Lushington in the case of *The City of London*, 4 Notes of Cases, 40, in 1845. In that case, which in most of its facts was similar to the one at bar, after stating the rule as well understood, that a steamer is to be regarded as a vessel sailing with the wind free, the court went on to say:

"I have had occasion over and over again to say in this court, and I shall endeavor to put it in the clearest language I can command, that whenever two vessels meet at sea, and there is any probable chance whatever of collision, it

is their duty to abide by the principles of navigation, and each of them to take the precaution to put the helm to port, when both are free, so as to avoid the chance of accident; and for this obvious and plain reason: that in a dark night like this, how often must it happen that some doubt will arise whether the vessel be direct ahead, or one point to the starboard or to the larboard? And are you to leave to mere chance the discovery of this with perfect accuracy, or are you not to adopt immediately that which is the only safe precaution; that is, following out the principle of the order, putting the helm to port at once, and so avoiding the collision?"

Third. That adherence to the rule laid down above by this highest English authority would insure against *the accident itself*, by giving an arbitrary rule, safe and sure, whether there really were danger or not; while the other rule, — that the sailing vessel should hold her course, and the steamer choose her course, at her own peril, although it might enable the court to determine with certainty where the fault lay after the collision had occurred, furnished by no means so sure a mode of avoiding it.

Fourth. That the rule of keeping to the right, having been adopted and sanctioned by judicial decision, and nine years' uniform practice in England and the British territories, (with whom was much of our commercial intercourse,) it was the best policy to adopt the same arbitrary rule, for the sake of uniformity of practice. Reverse Dr. Lushington's opinion, he argued, and the steamers and sailing vessels now multiplying between the two countries, must be governed by different rules, depending upon the waters they are navigating.

Fifth. To give an American decision adverse to that now prevalent in England for nine years, would place the vessels of the two countries in an awkward position. When two vessels should meet in a narrow channel in an obscure light, in waters not under the jurisdiction of either government, one would adhere to the American, the other to the English rule, and a collision would be the sure consequence. In obscurity and doubt, an arbitrary *uniform* rule of action is always the safest.

Sixth. It was contended that, on the evidence, the crew of the steamer descried the brig ten minutes before the collision, that the steamer was then going at the rate of six

miles an hour, and she must therefore have steamed one mile before the collision; that it had been shown that she could be stopped in two hundred yards, and, the engineer testifying that the signal to "reverse" only preceded the collision fifteen seconds, that it was culpable negligence in the steamer's crew not to "stop" and "reverse" sooner; — even though the sailing vessel had been wrong in "porting" her helm. For each vessel was bound to use all its powers to avoid injury to itself and others. Two wrongs could never make a right.

Sprague, J. — In these cases I have received great aid from the learned and able counsel.

They are cross libels for damage by collision.

The collision took place about eight o'clock in the evening of the 12th of August last, in that part of Boston harbor called the Narrows, where the channel is about a fourth of a mile in width. When the vessels discovered each other, the Osprey, a steamer, was going down the harbor, in about mid-channel, at the rate of seven or eight knots, the northern shore being on her larboard hand, and the southern on her starboard. The Fanny, a sailing vessel, was coming up the harbor, nearer to the southern shore, and between the southern shore and the middle of the channel, and her direction was either straight up the channel, or inclined to the south. There was a five-knot breeze from the S. S. W., which was a free wind for the Fanny, being a little abaft her beam, and on her larboard side. Upon discovering each other, the steamer put her helm to starboard, and the Fanny put hers to port, which carried both vessels toward the northern shore, where the collision took place. The steamer went so far as to take the ground on the northern shore, which was very bold, just at the time, or a few seconds before the vessels came in contact. The Fanny ran head on to the steamer, striking her starboard bow at an angle of about forty-five degrees.

The collision would have been avoided by the steamer taking the measure she did, if the Fanny had either kept her course, or put her helm to starboard; and it also would have been avoided by the Fanny taking the measure she did, if the steamer had put her helm to port. According to the weight of judicial opinion and nautical practice in England, the brig was right and the steamer was wrong; but, according to the weight of judicial opinion, and nauti-

cal practice in this country, the steamer was right and the brig was wrong.

This renders it necessary to examine the question on principle as well as authority. The great increase of navigation within a few years past, and the multiplication of clipper ships and steamers, moving with great speed, and the vast amount of property, and the number of human lives constantly exposed to the dangers of collision, render it of great and increasing importance that the rules for its prevention should be uniform throughout the commercial world; and that they should be plain and simple, and founded upon principle.

All the rules upon this subject are founded upon the supposition that there is some reason to apprehend collision; for, if the position and course of the vessels are such that there is no danger of their coming in contact, the rules are not called into action, and each vessel keeps on her course. It is to be premised, in the first place, that the object to be attained is safety; and, in the next place that it is desirable that this should be attained at the least cost, whether that cost consist of labor, delay, or risk.

All the cases may be comprised in two classes — First, when vessels meet on terms of equality; Second, when they meet on terms of inequality. The first comprises three cases, namely:

1. Two sailing vessels, both going free.
2. Two steamers.
3. Two sailing vessels, both close-hauled.

To all these cases one simple rule may be applied, namely, — Both go to the right. This rule is partly arbitrary, and partly founded on substantial reasons. It is arbitrary so far as it directs to the right rather than to the left; but in requiring both parties to take measures as far as practicable to get out of the way, it is founded on principle.

Take the first case, that of two sailing vessels approaching each other, both having the wind free. By the rule, both must diverge from their course. The reason is, that safety is more certain than if one only diverged, and the inconvenience is justly divided between them; as both can deviate from their course with equal facility, and both can, by a free wind, regain the line on which they were sailing before they met.

The same reason applies to the second case, that of two steamers meeting.

In the third case, that of two sailing vessels, both close-hauled upon the wind, the rule, as generally expressed, is, that the one on the starboard tack shall keep on her course, and the one on the larboard tack shall give way, by porting her helm. But the rule thus expressed is, in effect, a direction to both to go or keep to the right. The one on the starboard tack, being close-hauled, is already going as far to the right as possible. When, therefore, the rule says she shall keep on her course, it, in fact, says she shall keep to the right. The one on the larboard tack also goes to the right, and she must deviate far enough to avoid the collision. She is thus, indeed, subjected to the whole inconvenience necessary to secure the safety of both, that is, to all the labor, delay and risk of diverging to the leeward; but this is because the other vessel cannot diverge from her course, by going farther to windward.

The second class, above mentioned, viz., where vessels meet on terms of inequality, embraces two cases atleast, viz.:

1. Two sailing vessels, one free and the other close-hauled.

2. A steamer and a sailing vessel, the latter being close-hauled.

Here the rule is, — that the vessel having the advantage must keep out of the way, and the other must keep her course. Thus, in the first case, that of two sailing vessels, one going free and the other close-hauled, the one having the advantage of a fair wind can diverge from the line of her course so as to avoid collision, and then return to that line, or take another verging toward it and carrying her to the same point. But the vessel which is close-hauled, whether on the larboard or starboard tack, can give way only by going to leeward, and cannot regain the line of her previous course, but when she again hauls to the wind, must proceed on a line parallel to her former course. She thus loses the whole distance she has diverged to the leeward, which may sometimes occasion great delay and hazard. The same reasons apply with increased force to the second case,—that of a steamer meeting a sailing vessel close-hauled; the motive power of the former giving her a greater advantage than even a fair wind does to a sailing vessel.

We come now to the case before the court, — that of a sailing vessel going free, meeting a steamer. Shall we apply to it the rule of the first class, which requires both to go to the right; or the rule of the second class, which requires

the one having the advantage to keep out of the way, and the other to keep her course?

1. A steamer has an advantage over a sailing vessel, even with a free wind. She can oftentimes turn in shorter time and space, and check, stop, and reverse her motion, in a manner which a sailing vessel cannot. The motive power of the one is under human control and at all times available; that of the other is not. The wind bloweth not only where it listeth, but when it listeth, and it is of importance to the sailing vessel to improve it to the utmost, while fair. It may suddenly come ahead, or wholly cease, and in the latter case, she would be helpless.

2. Safety and convenience are promoted by having the rules simple, uniform, and governed by a plain principle. If we require a steamer meeting a sailing vessel to keep out of her way, and the sailing vessel to keep her course, whether she be going free or close-hauled, we have one plain rule for all cases between steamers and sailing vessels, which may be instantly applied. The moment they see each other, both will know their duty — the one that she must keep her course, the other that she must keep out of the way by all means in her power, without being restricted to the right, or to the left, or to any other particular measure. If we have one rule when the sailing vessel is close-hauled, and another when she is going free, then the steamer must first ascertain the direction she is sailing, and then whether the wind is fair for that course, which may sometimes be a matter of doubt and difficulty; for the steamer is not as watchful of the wind, and cannot as readily determine its direction as if she depended on sails. As she moves rapidly, the wind will often appear to be more ahead, and consequently more fair for the approaching vessel than it actually is, especially if it be light; besides which, the wind may sometimes be baffling. All these doubts and uncertainties will be obviated by having one rule for all cases of sailing vessels meeting steamers.

3. The general principle is, that the vessel having the advantage shall take all the burden of keeping out of the way. This principle governs all other cases of inequality, and should be applied to this also, unless there be some necessity for making it an exception.

On the other hand, it may be said that by requiring both to go to the right, safety will be promoted, as they will separate more rapidly, and also that the inconvenience will be divided,

instead of being wholly borne by one. And these considerations certainly have weight. But they apply also to the case of a vessel close-hauled, with her larboard tacks aboard, meeting a steamer — and yet in such case, those considerations have never been thought sufficient to outweigh the advantage of the other rule. The force of this last remark, however, is weakened by the fact that the inconvenience of giving way is greater to a vessel close-hauled, than to one going free.

On the whole, the balance of advantage seems to be in favor of one uniform rule.

Let us now see how the question stands upon authority. In the case of the *City of London*, in the High Court of Admiralty in 1845, reported in 4 Notes of Cases, 40, it was decided by Dr. Lushington, assisted by Trinity Masters, that in a case like the present, both vessels must port their helm, that is, go to the right. This decision rests entirely on the proposition that "a steamer is always to be considered a vessel with the wind large." Is this proposition true? It is not laid down in any statute, admiralty regulation, rule of the Trinity House, or other maritime association; nor required by any judicial decision or previous nautical usage.

Cases had arisen of collision between a steamer and a sailing vessel, close-hauled, and the courts had decided that in such cases the steamer should be under as great obligations as a sailing vessel with the wind large, that is, must keep out of the way; and the reason is obvious. The steamer has at least as great power and ability as such sailing vessels, and therefore should be under as great obligation. But has she not greater power, and may she not be under greater obligation? This question was not involved in these previous cases, and was neither decided nor considered by the court. In those cases, the declaration that a steamer was to be considered a sailing vessel going free, was first made use of. That expression was well enough for the occasion on which it was used, and taken *pro hac vice.* But it is not to be presumed that the court intended to lay down the proposition that a steamer was at all times, and in all cases, to be deemed merely a sailing vessel going free; and if they did, so far as it went beyond the case before the court, it was no decision, but a mere *dictum.* That expression or proposition was taken up by the court in the case of the *City of London*, and made the sole ground of decision. But it is neither an argument, nor the statement

of a principle. It is rather an assertion, founded on a comparison, and comparisons may illustrate, but can prove nothing.

I have said that the assertion that a steamer is always to be considered a vessel with the wind large, taken as a general proposition, embracing the case now before us, is not sustained by any previous rule or nautical usage.

This is confirmed by the very authority we are now examining. The learned judge does not say, or intimate, that there had been any such rule or practice in the precise case, viz., a steamer meeting a sailing vessel going free; but states the practice in the case of two sailing vessels, both going free, and the Trinity rule as to two steamers, and then asserts that the principle of that practice and the spirit of that rule, are applicable to the new case then before the court. But, are they applicable? The two former cases are, as we have seen, those of perfect equality, and the latter, one of inequality. How, then, the principle, or spirit of the rule or practice which govern the former, is applicable to the latter, is not apparent without explanation, and the explanation is not given. It is to be regretted that that learned and able judge did not go into the *rationale* of the rule he was about to adopt, and make a comparison of its advantages and disadvantages, and show that it would conduce to the safety and convenience of navigation. This was not done. The reason assigned is not satisfactory. The decision, however, as an authority upon this subject, is the highest in England, and entitled to very great respect.

There is a case decided in 1828, reported in the 2d of Haggard, 173, *The Shannon*, in which the opinion of the Trinity Masters and the judgment of the court thereon, seem to be adverse to the decision in the case of *The City of London.* The report, however, is imperfect.

In the courts of the United States, there have been four cases bearing upon this question. In *St. John* v. *Paine, et al.*, 10 Howard, 557, a sailing vessel in Long Island Sound, while on her starboard tack, with the wind two points free, came in collision with a steamer. It was decided that the steamer was in fault, because on her rested the obligation to keep out of the way.

Mr. Justice Nelson, in delivering the opinion of the court, says that the sailing vessel was nearly close-hauled; and the decision may not perhaps be deemed a direct authority where she has the wind large, but the remarks of the learned

judge fully cover such a case. He says that a steamer has a greater power of directing her course and controlling her motion than a sailing vessel going free, and is bound to keep out of her way; and that a sailing vessel meeting a steamer may keep on her course, whether she be close-hauled or going free.

The same doctrine is countenanced by the case of *Newton* v. *Stebbings*, 10 Howard, p. 586, in which a sailing vessel coming down the North River, and carried mostly by the current, the wind being light, came in collision with a steamboat going up. The court held that the steamboat was to blame, in not keeping out of the way; and by the report it seems that they did not deem it necessary to inquire what was the direction of the wind, or how far it could control the movements of the vessel.

In the case of *The Leopard*, in the District Court of Maine, in 1842, Daveis' Rep., p. 193, a sailing vessel going up the Kennebec river, with a fair wind, came in collision with a steam ferry-boat. It was held, that the former had a right to keep on her course, and that the latter was bound to keep out of her way, on the ground that the steamer has greater ability than any sailing vessel.

In the case of *The Northern Indiana*, in the Northern district of New York, in the year 1852, 6 Law Reporter, (new series), 434, a sailing vessel on Lake Erie, on her larboard tack, with the wind one point, or one and a half free, came in collision with a steamer. It was held, that the former had a right to keep her course, and the latter was bound to take the necessary measures to avoid a collision.

We now come to the evidence of nautical usage. One witness, the pilot who had charge of the Fanny, and whose conduct is now in question, testifies that by the British practice, when a steamer meets a sailing vessel going free, both port their helm, and that the British steamers which come to Boston always act upon and inculcate that rule. On the other hand, several pilots and shipmasters testify, that in such case, on the American coast, the sailing vessel always keeps her course and the steamer must keep out of the way. Upon the whole, I am led to the conclusion, that when a sailing vessel going free, meets a steamer, the rule that requires the former to keep her course and the latter to keep out of the way, is best sustained by principle, by authority, and by the evidence before me of nautical usage.

It remains to be seen whether this rule is applicable to the place where this collision occurred.

There are various exceptions to these general rules, which cannot here be enumerated. In general, they will be found to rest upon the principle, that when the observance of the rule would not promote but defeat its great purpose, safety, the rule ceases to be obligatory.

Thus, if there be two sailing vessels, both close-hauled, and the one on the larboard tack is so far to windward of the other, that, if she ports her helm, it will produce collision, the rule ceases to be obligatory. Such distance to the windward has been sometimes defined by saying that if the vessel on the larboard tack would, if both keep their course, be struck by the other abaft the beam, on the starboard side, she is not to port her helm.

So also, when collision has become inevitable, the general rules are no longer enforced, but each vessel may adopt such measures as will diminish her danger.

Again, there may be obstructions to navigation, which prevent the application of the rule.

In this case, the vessels were in the Narrows in Boston harbor, where the channel is a fourth of a mile wide. The banks are bold and there was no current, rock, shoal, vessel, or other obstruction, to interfere with the application of the rule, and it was therefore obligatory upon both vessels. The Fanny, then, ought to have kept her course, and in deviating from it, she did wrong. The Osprey had a right to go to the left, and in putting her helm to starboard, she was not to blame.

But there is another ground on which it is insisted that the Osprey did wrong, and that is, in not stopping her engine as soon as she might and ought to have done, after she had put her helm to starboard, and saw that the Fanny had put hers to port. Although the Fanny made a mistake, yet the steamer was still bound to prevent a collision by all practicable and reasonable means, and when she saw that the Fanny had put her helm to port, she ought promptly to have stopped her engine, if that would have avoided the collision. How is the fact? (The judge here went into a particular examination of the evidence.) Upon the whole I do not think that it is shown that the Osprey was negligent in this respect, or in any manner to blame, and the decree must be against the Fanny.

Recent English Decisions.

Exchequer Chamber.—Error from the Queen's Bench. Wednesday, May 10, 1854.

(Before Jervis, C. J., Pollock, C. B., Parke, B., Alderson, B., Cresswell, J., Williams, J., Martin, B., and Crowder, J.)

Bridges *v.* Fisher.

Lottery Acts— Illegal Agreement — Sale of Lands and Houses —Covenant to secure payment of Purchase-money.

To a declaration upon a covenant for payments of a sum of money, the defendant pleaded that before the making of the deed it was unlawfully agreed between plaintiff and defendant that plaintiff should sell and defendant buy lands and houses, to the intent and for the purpose, as the plaintiff well knew, that the same should be sold by lottery, contrary to the statute; that afterwards, in pursuance of the said illegal agreement, the said lands and houses were sold and transferred to defendant, and that, part of the purchase-money being unpaid, the defendant, to secure the payment thereof, made the covenant declared upon. Judgment for the plaintiff, *non obstante veredicto*, having been given in the court below:

Held, (reversing that judgment,) that the plea was a good answer to the action, inasmuch as it showed sufficiently after verdict that the covenant was made in furtherance of the original illegal agreement, and as, even if it would not bear that interpretation, it showed at all events that the security was given for an illegal consideration, and therefore void.

This was a writ of error brought by the defendant, upon a judgment given for the plaintiff by the Court of Q. B. *non obstante veredicto*, upon the first plea. See report of case in court below, 2 Ell. & Bl. 118; 21 L. T. Rep. 100.

Declaration.—For that defendant, by his deed bearing date 27th Oct. 1849, covenanted with plaintiff for himself, his heirs, executors, and administrators, that he defendant, his heirs, executors, administrators, and assigns, should and would well and truly pay or cause to be paid to plaintiff, his executors, administrators, and assigns, the sum of 630*l.*, with interest thereon after the rate of 5*l.* per cent. per annum, on 27th April, 1851, without making any deduction or abatement on any account whatever; and also, that in case the said sum of 630*l.* should not be then paid, defendant, his executors, administrators, or assigns, should and would thenceforth pay unto plaintiff, his executors, administrators, and assigns, interest for the same after the rate aforesaid, by even and equal half-yearly payments, until the same should be paid; yet defendant did not pay to plaintiff on 27th April, 1850, the principal sum of 630*l.*, or any part thereof, and the same is still unpaid, &c.

Plea 1. That before the making of the said deed in the declaration mentioned, it was unlawfully agreed by and between the plaintiff and the defendant that the plaintiff should sell, assign, and transfer to the defendant, and that the defendant should purchase of the plaintiff, and accept from him a conveyance of, certain lands and houses for the residue of a term of years, subject to a certain mortgage thereon, and to the payment of a certain sum of money at and for, and in consideration of, a certain sum of money to be therefore paid by the defendant to the plaintiff, to the intent and in order and for the purpose, as the plaintiff at the time of the making the said agreement well knew, that the said lands and houses should be exposed to sale and sold by way of lottery, or by lots, tickets, numbers, or figures, or by a method or device depending upon, or to be determined by, lot or drawing, contrary to the form of the statute in such case made and provided. And the defendant further says that afterwards, in pursuance of the said illegal agreement, the said lands and houses were sold, transferred, and assigned for the residue of the said term of years, subject as aforesaid; and a part of the said purchase or consideration money to be paid by the defendant to the plaintiff for the same being unpaid, the defendant, to secure the payment thereof to the plaintiff, made the said deed and covenant in the declaration mentioned, the said 630*l.* being parcel of that money.

The case was argued on the 4th of May, by *Hugh Hill*, for the plaintiff in error; and by *Willes*, contra.

The following authorities were referred to:—*Bartlett* v. *Vinor*, Carth. 251; *Lightfoot* v. *Tenant*, 1 B. & P. 551; *Paxton* v. *Popham*, 9 East, 408; *The Gaslight Company* v. *Turner*, 5 Bing. N. C. 666; 6 Ib. 324; 8 Scott, 609; *Jones* v. *Broadhurst*, 9 C. B. 173; *James* v. *Isaacs*, 22 L. J. 73, C. P.; *Belshaw* v. *Bush*, 11 C. B. 191; Chitty on Contracts, 3d ed. 663; Byles on Bills, 97; 1 Wms. Saund. 393; *Langton* v. *Hughes*, 1 M. & S. 593; *Pellecatt* v. *Angell*, 2 Cr. M. & R. 311; *Beaumont* v. *Reeve*, 8 Q. B. 483; and the stats. 10 & 11 Will. 3, c. 17, s. 1; 12 Geo. 2, c. 28, ss. 1, 4. *Cur. adv. vult.*

Jervis, C. J. now delivered the judgment of the court. This was a writ of error from the Court of Q. B. The declaration states in substance that the defendant, by his deed of covenant, covenanted with the plaintiff, for himself, his heirs, executors, and administrators, that he, the defend-

ant, his heirs, &c., shall and will truly pay the sum of 630*l.*, with interest, on a day named. The defendant pleaded, first, that before the making of the deed in the declaration mentioned, it was unlawfully agreed by and between the plaintiff and the defendant, that the plaintiff should sell, assign, and transfer to the defendant, and that the defendant should purchase of the plaintiff, and accept from him a conveyance of certain lands and houses for the residue of a term of years, subject to a certain mortgage thereon, and to a payment of a certain sum of money at and for and in consideration of a certain sum of money to be therefore paid by the defendant to the plaintiff, to the intent and for the purpose, as the plaintiff at the time of the making of the said agreement well knew, that the said lands and households be exposed to sale and sold by way of lottery or by lots, tickets, in numbers, or figures, by a method or device depending upon or to be determined by lot or drawing, contrary to the form of the statute in such case made and provided. And further, that afterwards, in pursuance of the said illegal agreement, the said lands and houses were sold, transferred, and assigned for the residue of the said term of years, subject as aforesaid; and part of the said purchase or consideration money to be paid by the defendant to the plaintiff for the same being unpaid, the defendant to secure the payment thereof to the plaintiff, made the said deed and covenant in the declaration mentioned, the said 630*l.* being parcel of that money. The second plea was, in substance, the same as the first, except that it stated the sale to be colorable. At the trial, the jury found the first plea for the defendant; but, the Q. B. having given judgment for the plaintiff *non obstante veredicto*, the defendant below brought this writ of error. The first question is, what is the meaning of this plea? It was stated in the argument that it did not sufficiently affect the plaintiff with a participation in the intent and purpose of ultimately selling the land by lottery; because the interpretation of the words "as the plaintiff, at the time of making such agreement, well knew," showed that the plaintiff merely knew of the intent; but we think the plea cannot be so read. After verdict, every fair intendment must be made in favor of the plea, giving full effect to all the words used; and, finding, as we do in this plea, a substantive averment that the agreement between the plaintiff and the defendant for the sale was to the intent and for the

purpose of a future sale by lottery, we cannot qualify that allegation so as to make the plea bad, merely because it is added, perhaps unnecessarily, that the plaintiff knew of that intent. It was also said in the argument, and this also formed the basis of the judgment of the court below, that it did not appear that the covenant was given in pursuance of that agreement, or was connected with it. If it were necessary to make the plea good, it might and ought after verdict, to be taken to mean that the lands were sold and transferred in pursuance of that agreement; and also, the consideration-money being in part unpaid, that the covenant was given in pursuance of the agreement. But, according to the view we take of this case, it is not necessary that the plea should be so understood. It clearly shows that the covenant was given to secure the payment of a part of the purchase or consideration-money for the land, the subject of the agreement. Upon the record so framed, and so understood, we are of opinion that the plaintiff in error is entitled to the judgment; and we therefore think that the judgment of the court below must be reversed. It is not denied that the original agreement was tainted with illegality. All lotteries are prohibited by the statute of the 10 & 11 Will. 3, c. 17, s. 1; and by the statute 12 Geo. 2, c. 28, s. 4, all sales of houses, lands, &c. by lottery are declared to be void to all intents and purposes. The agreement, being illegal, could not be enforced; and no action could be brought to recover the purchase-money of the land, the subject-matter of the alleged agreement. This was conceded in the court below, and was not denied in the course of the argument before us; and, if necessary, might be established by many authorities. But it is said the covenants may be good, and may be enforced at law, even although the original agreement was illegal, and the purchase-money would not have been recoverable by reason of that illegality, if it had not been secured by instruments under seal. It is certainly true that for a bond or other instrument under seal no consideration is necessary; but it does not, therefore, follow that every such instrument may be enforced by an action. The authorities cited in the arguments show that where a bond or other instrument is connected with an illegal agreement, it cannot be enforced. *Lightfoot* v. *Tenant; Paxton* v. *Popham; Gaslight Company* v. *Turner.* Therefore, if these pleas allege that the covenant was

given in pursuance of an illegal agreement, they would upon these authorities be an answer to the action; but if they are not so understood, we think they show a good defence. It is clear that the covenant was given for the payment of the purchase-money. It springs from, and is the creature of, that illegal agreement; and if the law would not enforce the illegal contract, so neither will it allow parties to enforce a security for purchase-money, which by the original bargain was tainted with illegality. The case of *Beaumont* v. *Reeve*, much relied on by the counsel below, does not in our judgment affect this question. It is clear that past cohabitation and previous seduction are not good considerations for a parol promise; but they are not, therefore, illegal considerations — they are no considerations at all. But, inasmuch as a bond or other instrument under seal is good without any consideration, it by no means follows that a covenant to pay a sum of money, tainted with illegality, can be enforced merely because a bond for maintenance, founded on past cohabitation and previous seduction, is good. If the agreement had been made to pay a sum of money in consideration of future cohabitation, and after cohabitation the money had been unpaid, and a bond given to secure that money, that would be the same case as this; and such a bond could not under such circumstances be enforced. For these reasons we are of opinion that the judgment should be reversed.

Judgment reversed.

Court of Exchequer. — June 2, 1854.

THEOBALD v. THE RAILWAY PASSENGER ASSURANCE COMPANY.

Railway Accident — Insurance — Damages.

A party, having obtained a ticket of insurance against railway accident, during the journey for which he was insured, had occasion to get out of the railway carriage in which he was travelling; in doing so he put his foot on the step (which was wet) of the carriage, slipped from it, and seriously injured himself.

Held, that this was a railway accident within the meaning of the insurance, and the defendants liable but for the damage and expenses only. The true measure of damages is the amount of injury sustained by the accident.

THIS was an action against the defendants upon an insurance against railway accident. The plaintiff obtained his railway ticket from Birmingham to Shrewsbury, and

also an insurance ticket. It was a wet day, and, having occasion to get out at Wolverhampton, he put his foot on the step, which was wet, of the railway carriage; slipped from the step, and was much injured. The action was tried in London before the Lord Chief Baron, and a verdict returned for the plaintiff, damages £100 for loss of time, £100 for loss of profit, £34 for expenses, &c. A rule *nisi* was subsequently obtained to set aside the verdict for the plaintiff on the second issue, and to enter it for the defendants, or reduce the damages.

Bramwell, Q. C., and *Phipson*, showed cause.

Sir F. Thesiger, and *Davidson*, contra, in support of the rule. The several acts of Parliament were referred to, and Sir F. Thesiger contended that the accident, to come within the proper definition of railway accident, "must be connected with the trains, whether in motion or not, occasioned by the negligence of the company or by their servants or not, by unavoidable accident, or by collision with other trains, or otherwise, and not by the acts of the party himself." This was a question of law, and not free from some difficulty; it depended upon the particular construction of the terms used in the Acts of Parliament. *Cur. adv. vult.*

June 13. — Pollock, C. B., delivered judgment. — This was a motion to reduce the verdict, but also prayed that the verdict might be entered for the defendants upon one of the pleas. The objection to the verdict altogether was, that this was not a railway accident within the meaning of the policy of insurance. The objection to the amount of the verdict was this, that the defendants were not liable for loss of time or loss of profit, but that they were only liable for the injury occasioned by the accident, assuming it to be a railway accident. The case was argued a few days ago, and the court took time to consider, hoping in the mean time that the parties might possibly come to some arrangement; but it was intimated to us that there was an anxiety to procure the judgment of the court on the part of the company, and therefore they were unwilling to enter into any arrangement; and, I believe, on the other side also there was an indisposition to come to a conclusion. It would have been more satisfactory, perhaps, if our decision was to be taken as laying down any rule; it might have been more satisfactory if all the elements, which ought or might enter into such a question, were

more clearly or more plainly before the court. The facts of the case seem to be these. The plaintiff, who was about to take a journey into the north, a journey which involved his going by two distinct railways, insured with the defendants for the amount of £1000. In getting out of one of the carriages on a frosty morning his foot slipped; but the jury found that there was no negligence on his part in reference to the accident; and the first question to be considered is, whether this is a railway accident within the meaning of the policy; and we are of opinion that it is. I do not know, however much the company may desire that we should lay down a rule, that we are called upon, or that we should do our duty if we laid down any rule beyond that which was necessary to decide this case. Considering the great number of particulars that may enter into the decision of the question, the very complicated character which it may assume under some circumstances that at present we may not anticipate, I think it would be very unsafe; and I believe the rest of the court in that concur with me. On a single instance brought before us with certain circumstances alone, not all of them of a perfectly general nature, I think it would be assuming too much if we were to lay down a rule that is to govern all cases. It is sufficient for us on the present occasion to lay down so much of what we deem to be the law applicable to the case as is necessary to decide the present question. On the present occasion it is quite plain that the plaintiff was a traveller on the railway. It is quite plain that his journey, though it had in one sense terminated by the carriage having stopped, he had not at the time of the accident ceased to be connected with the carriage by being still in or upon it. He was stepping out of it when this occurred, without any negligence or culpable inattention to his security, which the jury have found. This occurred while he was doing an act, which, as a passenger, he must necessarily do; every passenger must get into a carriage and out of the carriage when the journey is at an end; and he can hardly be considered as disconnected with the carriage and railway and with the machinery of motion — he can hardly be considered as disconnected with it, until the time when he was safely landed, as it were, if we may use that expression, from the carriage, and got upon the platform. While in the act of leaving the carriage this accident occurred, and it is attri-

butable to his being a passenger on the railway, and it arises out of an act immediately connected with his being such passenger. Under these circumstances we are of opinion that this was a railway accident within the meaning of the policy. The action, therefore, in our judgment, is maintainable, and so much of the rule as prays to enter our judgment on one of the pleas, must be discharged. In order that the question might be considered, the verdict of the jury was taken separately: they found for damages and expenses £34 19*s.*; they found for loss of time £100; and they found for loss of profit also £100. At the time, the plaintiff at the trial made his claim for all three. He claimed £100 for loss of profits, £100 for loss of time, and £34 19*s.* for damages and expenses. I thought it quite clear he could not claim both loss of time and loss of profit; for in fact they are the same thing under two different forms. If he was indemnified for his time, then he had no right to charge for loss of profit; if he was indemnified for his profit, he had no right to charge for loss of time. I had very considerable doubts whether he was entitled to charge for either. I therefore directed the jury to find one only of those sums, reserving liberty to the defendant to move to reduce the verdict, and to strike out the £100. On considering the argument raised on both sides, we are of opinion that the verdict must be reduced to the sum of £34 19*s.* We are of opinion that the object of the insurance, whether with reference to death or any accident inflicting an injury short of death, must receive the same consideration; and we are of opinion, that in considering the damage and injury done to the traveller, the consequential mischief of losing some profit is not to be taken into consideration; otherwise a passenger whose time is more valuable than another, would, for precisely the same personal injury, receive a larger remuneration than another, whose time would be of less value. What the insurance company calculate upon indemnifying for, is the expense and pain and loss, it may be, of a limb, connected with the immediate accident, and not the remote consequences that may follow, according to the pursuit or profession which the passenger may be following. We think, therefore, that the verdict must be reduced to the sum of £34 19*s.* So much, therefore, of the rule will be absolute as reduces the verdict to that sum; and the residue of the rule will be discharged.

Alderson, B. — It was contended that the difference in the estimate of the damage must be in the same proportion between the amount of injury sustained by the accident, and the amount of loss by a total death. The amount is regulated in the case of death by the sum insured; and I believe the court are of opinion — I am sure I am — that we can institute no such comparison between the accident and the death, and that the true measure of damages is the amount of injury the plaintiff sustained by the accident, not exceeding the sum which they would have to pay in case of death; and my own impression is, that a railway accident means an accident to the person in the course of travelling by a railway, and arising out of the circumstance of that fact of travelling ending in injury, and it does not in the slightest degree depend upon any accident to the railway itself.

Rule absolute to reduce the verdict to £34 19*s.*

Abstracts of Recent English Decisions.

[Selections from the Marginal Notes of Cases reported in the Law Times, during July and August, 1854.]

Appeal from the Court of Session in Scotland.

Master and Servant — Negligence causing Death of Servant — Evidence for a Jury — Nature of Exception to Judge's Ruling. In an action by the widow of A., a miner, to recover compensation for his death, alleged to be caused by the negligence of the defendants, his employers, it appeared from the plaintiff's evidence that A. worked in the main road of the pit, taking out coal there; that he had often complained of a large stone in the roof, which was in a dangerous position; that defendants' manager had said there was no danger, but promised frequently to remove it, yet had not done so; that at last two men had been sent to remove the stone, and, on reaching the spot, they found A. filling his hutch with coals, and they waited till he should finish it, but before that had been done, the stone fell and killed A. There was conflicting evidence as to whether the men told A. to fill his hutch first, before they would remove the stone, or whether A., for his own benefit, asked the men to wait till he filled it:

Held, reversing the judgment of the Court of Session in Scotland, that there was evidence to go to the jury; and the two questions for them were — first, was the stone negligently allowed by defendants to remain in a dangerous position too long; and, secondly, did A. lose his life in consequence of that negligence, and not in consequence of his own rashness.

If an exception to a judge's ruling sufficiently call the judge's attention to the point, it is immaterial whether the counsel may set forth as the

ground of his exception that which is bad law. — *Paterson* v. *Wallace*, *H. L.*[1]

Common Law.

Copyright — Right at Common Law — Right of Foreigners — Assignment abroad — Printing Foreigner's Works — Partial Assignment — Stat. 8 *Anne, c.* 19. Copyright, which is the exclusive right after publication of multiplying copies of a work, is not to be confounded with the right before publication to the MS. as a specific chattel.

An author has by the common law of England no copyright in his work after publication. The statute 8 Anne, c. 19, created that kind of property. But that statute confers copyright only on those owing an allegiance, natural or temporary, to this country, and first publishing here. Thus, a natural-born Englishman domiciled abroad, as he cannot shake off his natural allegiance, acquires copyright in his work by sending the MSS. and first publishing here. But a foreigner, residing abroad does not; nor can he secure copyright by sending an agent with his MSS. to this country. He must come here in person, though his residence here may be only temporary.

Held, per Lord St. Leonards. — An assignment of copyright, wherever made, and whether valid or not by the law of the country where made, will not be held valid in England, unless it is in writing, and attested by two witnesses: — Lord Brougham — hesitating whether an attestation of two witnesses was not dispensed with by 54 Geo. 3, c. 156: — No opinion by Lord Cranworth, L. C.

Held, per Lord St. Leonards. — The books, of which the stat. 8 Anne, c. 19, protects the copyright, must not only be first published, but they must be printed here. Hence there is no copyright in works printed abroad, and sent here to be first published: — No opinion by Lord Cranworth, L. C., or Lord Brougham.

Held, per Lord St. Leonards. — Copyright is in its nature an indivisible right; it may be transferred, but cannot be divided. Hence, a partial transfer, as for instance where the right is confined to the United Kingdom only, is void; but this is not to be confounded with a mere license: — No opinion by Lord Cranworth, L. C., or Lord Brougham.

A., a foreigner residing at Milan, composed an opera, and by a writing valid according to the law of Milan, assigned it to B., also a foreigner there residing. B. then came to England, where, by a deed attested by two witnesses, he assigned to C., a natural-born Englishman, for valuable consideration, the copyright for the United Kingdom. C. duly entered the book in Stationer's Hall, and first published it in this country, there having been no prior publication any where else. D., an English bookseller, printed and sold copies without C.'s consent.

Held, disagreeing with the majority of the judges, and reversing the judgment of the Ex. Ch., that C. had no right of action against D.; for C. could have no greater right than A., through whom he claimed; and A., being a foreigner resident abroad at the time of publication here, was not within the protection of the statute, 8 Anne, c. 19, and had no copyright by the law of England. — *Jefferys* v. *Boosey*, *H. L.*

Ship — Action for Freight — Jurisdiction of Admiralty Court — Plea in Bar. To an action for freight, the defendant pleaded that, before the freight was earned, the master of the ship raised money for the use of the ship upon bottomry-bond, pledging the ship and freight; and that upon the nonpayment of the sum borrowed, and after the commencement of the action, proceedings were taken in the Admiralty Court; and that, in

[1] House of Lords.

obedience to a monition from that court, the defendant paid into the Court of Admiralty the amount of the freight.

Held, a good plea in bar to the further maintenance of the action, although the amount secured by the bottomry-bond was less than the freight. — *Place and another* v. *Potts and another. Exch. Ch.*[1] *Error from Exch.*

Evidence for Jury — Railway Tickets — "Not Transferable" — Negligence. In an action against a railway company for injury to the plaintiff by negligence, the declaration alleged "that the plaintiff at the time, &c. was lawfully in a certain carriage upon a certain public highway called the Great Northern Railway." The defendants pleaded that "plaintiff at the time, &c., was unlawfully and not lawfully in the said carriage." The evidence went to show that a practice existed by which the reporters engaged on *Bell's Life* (of whom plaintiff was one) when going to any races travelled free. The plaintiff, acting *bonâ fide* in his capacity as reporter to the said paper, was supplied with a ticket which bore the name of a person connected with the paper, but not the plaintiff's, and on it were the words "not transferable," and a memorandum that any other person than the one named using it would be liable to a penalty, or liable to pay the fare; plaintiff showed this pass to the porter, whose business it was to examine them, who said it was all right, and put plaintiff in the carriage. It was not distinctly proved that the plaintiff was personally known to the porter; but it was proved that the plaintiff and other reporters had on several occasions travelled with similar tickets to that used in this instance by plaintiff, and upon which their names did not appear, but those of other persons, and that some of those persons were personally known to the officers of the railway; but knowledge of such acts was not conclusively brought home to the company.

Held, that there was evidence for the jury to consider whether plaintiff was lawfully in the carriage as alleged in the declaration; that the issue raised was not as to the lawfulness of the carriage being on the highway; but that the question was, whether the plaintiff was in the carriage under such circumstances as to be considered a trespasser. — *The Great Northern Railway Co.* v. *Harrison, Exch. Ch. Error from Exch.*

Evidence — Ancient Map — Production and Custody. On an issue whether a *locus in quo* is in the county of A., a map was tendered in evidence, printed on paper from an engraved copper-plate, and having on the face of it the following words: "New map of the county of A., taken from the original map published by B. C., in 1736, who took an accurate survey of the whole county, now republished with corrections and additions by the sons of the author, 1766, and engraved by D. E." This map was produced out of the custody of a county magistrate, who had had it in his possession for the preceding twelve years.

Held, that it was inadmissible in evidence, the statement on the map merely amounting to a statement of the sons of the author as to its accuracy, without in any way showing that they had authority to make the map from any one interested; and that the custody from which it came was also insufficient. — *Hammond* v. *Bradstreet, Exch. Ch. Error from Exch.*

Will — Construction — Estate for Life or in Tail. Devise of real estate to J. K. for life, and after his decease to the first son of the body of the said J. K., for and during the term of his natural life only, and from and after his decease to his first son, with remainder to the second, third, and all other sons of the body of such last-mentioned son forever, the elder being always preferred to the younger; and, in default of all such issue as aforesaid, then to the testatrix's own right heirs forever.

---

[1] Exchequer Chamber, Error from Exchequer.

Held, that the first son of J. K. took an estate for life only. — *Kershaw* v. *Kershaw*, *Q. B.*[1]

Landlord and Tenant — Lease for Three Years not under Seal — Implied Tenancy from Year to Year — Notice to quit — Statutes 7 & 8 *Vict. c.* 76, *s.* 4, *and* 8 & 9 *Vict. c.* 106, *s.* 4. A tenant occupied premises for three years under an agreement of demise for that term, which was void by statute 8 & 9 Vict. c. 106, s, 4, because not under seal. Upon the expiration of the three years, the landlord brought ejectment, without any notice to quit.

Held, that the action was maintainable, because, though the statute rendered the instrument void as a lease, and the defendant was only tenant from year to year, that tenancy from year to year expired by agreement of the parties at the end of three years; and that in this respect the law was the same under statute 8 & 9 Vict. c. 106, s. 4, as it had been under the repealed statute, 7 & 8 Vict. c. 76, s. 4. — *Tress* v. *Savage*, *Q. B.*

Lease — Assignee of Reversion — Forfeiture — Covenant to Insure. An assignee of the lessor cannot take advantage of right of entry for breach in the time of lessor of a covenant to insure.

A lease, containing a covenant "that lessee will insure at his own expense, in the joint names of the lessor, his heirs and assigns, and the lessee, his executors, administrators, and assigns, in such fire office as the lessor, his heirs or assigns, shall direct," was assigned without notice to the lessee. Before the assignment there was no breach of the covenant of which the assignee could take advantage. At the time of action brought by assignee for an alleged breach of this covenant the premises were uninsured; but there was no evidence that defendant had notice of the assignment.

Held, that there was no breach of covenant since the assignment and before action of which the assignee could take advantage. — *Crane* v. *Batten*, *Q. B.*

Case for Arrest for excessive sum — Judgment — Ca. sa. — Indorsement. An action lies against an execution creditor for maliciously causing a warrant on a *ca. sa.* to be indorsed to levy the whole amount of a judgment when part has been satisfied, if damage is thereby caused to the execution debtor. — *Churchill* v. *Siggers*, *Q. B.*

Devise — Remoteness — Contingency — No lawful Issue. Devise to E. the daughter of my said sister A. for life, and from and after her decease to her eldest son then living (if any); "and in case of no lawful issue of any son," to the eldest son of my nephew J. W. then living, or unto the next eldest son of my nephew, R., by lawful issue. "And I do intend and purpose that the said messuages shall not be sold or divided, but always kept entire, and descend in perpetuity forever to the eldest heir-at-law of J. and A."

E. died a spinster. The plaintiff was the eldest son of J. W., and alive at the making of the will; and, J. W. being the eldest son of J. and A., and J. W. being dead, the plaintiff was also the eldest heir-at-law of J. and W.

Held, that by the will, on the death of E., a spinster, the estate passed to the plaintiff; and that the devise was not void for remoteness. — *Sarton* v. *Clapham and others*, *Q. B.*

Infancy — Ratification of Contract — 9 *Geo.* 4, *c.* 14. A. accepted a bill of exchange during his infancy, and, after attaining his majority, wrote to the holder of the bill, "Pray make yourself easy about it (the bill); I will take care it is paid. And Sir Henry (meaning the father of the drawer) returns to England in June."

---

[1] Queen's Bench.

Quære, was this a sufficient ratification to take the case out of the 9 Geo. 4, c. 14?

Per Parke and Alderson, BB., it was not.

Per Platt and Martin, BB., it was. — *Morson* v. *Blane*, *Exch.*[1]

Contract for Wool — Condition precedent — Pleading. The declaration stated a contract for wool to arrive at 10½*d.* per pound, laid down either at Liverpool, Hull, or London, deliverable at Odessa during August then next, to be shipped with all dispatch, &c.; the names of the vessels to be declared as soon as the wool was shipped; that the wool was delivered at Odessa, to the agents of the plaintiff, and was with all dispatch shipped on board a certain ship, which sailed from Odessa with the said wool on board, and afterwards arrived at Liverpool with the said wool on board. There was further an averment of notice to the defendants, and of the lapse of a reasonable time after arrival, and of performance by the plaintiff of all conditions.

Breach, the defendants would not accept or pay for any part thereof.

To this the defendants pleaded, that they agreed with plaintiff to buy the said wool for the purpose of reselling the same in their trade; that wool fluctuated greatly in price in the market, and that they could only resell the said wool when they had notice of its being shipped and the name of the vessel in which it was shipped declared according to the contract mentioned in the declaration, of which plaintiff had notice; but that plaintiff did not declare to defendants the name of the vessel in which the wool was shipped at or within the time within which he was bound to declare, that is to say, as soon as such wool was so shipped, but omitted and delayed so to declare the name for a long and unreasonable time; and before they had such notice, the price of wool had fallen in the market, &c., wherefore they did not, nor would accept or pay for the said wool.

Held, a good plea, such declaration of the name of the vessel being a condition precedent to the acceptance of the wool. — *Graves* v. *Legg and another*, *Exch.*

Contract for Iron — Merchantable quality — Warranty. A contract was entered into between an iron manufacturer in Staffordshire, and a merchant at Liverpool, for certain hoop iron, to be delivered at Liverpool within a certain time, and to be sent by canal; and the goods in the course of the transit, and in consequence of the inclement season of the year, unavoidably got rusted.

Held, that there was no implied warranty on the part of the manufacturer to deliver the goods at Liverpool in a merchantable condition, but that the vendee was subject to the risk of the deterioration necessarily consequent upon the transmission of the iron. — *Bull* v. *Robison*, *Exch.*

When a ship is advertised to sail by a certain day: Quære, what is a reasonable time for its sailing? and whether more than a contract to sail within a reasonable time from the date is implied. — *Taylor* v. *Tindall and others*, *Q. B. N. P.*,[2] *before Erle*, *J.*

Evidence — Telegraphic Messages — Contract — Commission. Semble, telegraphic messages are admissible evidence.

A broker cannot recover on a *quantum meruit* for the sale of a ship unless the contract be signed by vendor and purchaser, and the sale in all other respects be complete. —*Meeson* v. *Oliver*, *Q. B. N. P.*, *before Coleridge*, *J.*

Use and Occupation — General Issue — Waiver of Contract. An agreement that rent shall not accrue until the premises are complete, does not

---

[1] Exchequer. [2] Queen's Bench. Nisi Prius.

preclude a lessor from recovering for use and occupation, if the lessee enters actually or constructively. — *Smith* v. *Eldridge and another, C. C. P. N. P.*,[1] *before Williams, J.*

Equity.

Practice — Substituted Service — Infants — Jurisdiction over when resident abroad — Custody — Ward of Court. The principle on which substituted service is ordered is, that there is reasonable ground to suppose that the service will come to the knowledge of the defendant.

This court has jurisdiction over infants who are natural-born English subjects, though born and resident abroad.

This court will not, except under very special circumstances, make an order with reference to the custody of infants in a case where the court sees no reasonable means of enforcing compliance with its order. — *Hope* v. *Hope, C. A. C.*[2]

Principal and Surety — Discharge of Surety — Bankers. By articles of partnership it was agreed that A. and B. should carry on business together in partnership for five years. A joint and several bond was given by B. and C. to A., to indemnify him from all loss which might arise from carrying on the business; C., however, being only a surety for B. The business was carried on by A. and B. twenty months after the expiration of the five years. A dissolution then took place, and A. left the assets under the sole control of B., for the purpose of winding up the affairs of the partnership. Subsequently B. left the country, taking with him a portion of the assets, and left the partnership concern unable to meet its liabilities. A. afterwards discharged these liabilities, and took proceedings at law upon the bond against the executors of C.

Held, that the conduct of A. had been such with respect to carrying on the business after the expiration of the five years, and in other respects, as to discharge C. from his liabilities as surety on the bond, although he knew that the partners were not proceeding to wind up the partnership at the stipulated period.

Where a plaintiff makes a case founded on fraud, and an alternative case not founded on fraud, his bill will not be dismissed because he fails to prove fraud, if he prove the other case. — *Small* v. *Currie, C. A. C.*

Will — Construction — Clause of Substitution — "Said Children." A testator having given a sum of stock to trustees upon trust for E., one of his children for life, with remainder to E.'s children, share and share alike, gave the same in default of children of E., living at her death, to "all and every my children, then living, and the child or children of such of my said children as shall be then dead, in equal shares and proportions; but so that such my grandchildren shall only be entitled among them to such share or shares as their parent or parents would have been entitled to in case they had been living."

Held, that, upon the death of E. without issue, the children of a child of the testator, who had died before the will was made, took no interest under the gift. — *Re The Trustee Relief Act, and Re The Trusts of the Will of Peter Thompson, deceased, C. A. C.*

Will — Construction — "Money" — Funds. A testatrix, being entitled to certain sums of money in the Funds, and possessing also a small sum of cash in the house, bequeathed by will the whole of her money to a tenant for life; at his death to be divided between her nieces A. and B.; her clothes to be divided likewise between them, her watch and trinkets for her niece B.; and declared that the longest survivor of her said nieces was to become possessor of the whole money.

---

[1] Court of Common Pleas. Nisi Prius.
[2] Court of Appeal in Chancery.

Held, affirming the decision of the court below, that the money in the Funds did not pass under the description of "money."

The word "money" in a will, will only be taken to have been applied in its correct and proper use, unless there is something in the context which evidently points to a more extended signification. — *Lowe* v. *Thomas*, *C. A. C.*

The Right of the Crown to the Seashore — Prerogative of the Crown. The average of the medium tides in each quarter of a lunar revolution during the whole year gives the limit, in the absence of all usage, to the Crown to the seashore. — *The Attorney-General* v. *Chambers and others*, *C. A. C.*

Will — Construction of — Intention — Perpetual Annuity — Estate Tail — Issue taking by Purchase — Recital — Rule in Shelley's Case — Knight v. *Ellis*, 2 *Bro. C. C.* 509, *approved.* T. W., by his will, gave to A. M., wife of R. M., "an annuity of 600*l.* to commence six months after my decease, for her life, and the issue from her body lawfully begotten, on failure of which to revert to my heirs. And I have to request that my very good friends N. E. K. and J. C., will act as trustees to the said A. M., so that the said annuity may be secured for her sole use and benefit, and that it may be paid to her quarterly or half-yearly, as they may deem proper."

Held, by the Lord Chancellor and Turner, L. J., that the word "issue" was there a word of purchase, and that A. M. took an equitable interest only for her life for her separate use, and that her children and other issue upon her death took the annuity as a class in equal shares as joint tenants.

A deed was executed in 1797, putting a particular construction upon the will. A. M., not being a party to the deed of 1797, executed a deed in 1808, previously to her marriage, which deed recited the former deed.

Held, by Knight Bruce, L. J., that, as against the issue of the marriage, A. M. was bound by that recital, and could not put an opposite construction upon the will.

Rules drawn from principles of tenure have been adopted as canons of construction, in cases where tenure is out of the question; but by such adoption the intention of donors or settlors has been defeated.

There is no doubt but that the intention ought to prevail, if it can be enforced without breaking in upon any rule of law; but this resolves itself into a question of construction. But the rule, that words which would give an estate tail in a freehold, are to be considered, in the case of chattels, as giving the thing absolutely; for that no chattels can be limited over after a dying without issue; this rule is too strong to be got over.

A bequest of personal property to a man for life, and afterwards to the heirs of the body, is an absolute bequest to the first taker. Whatever disposition would amount to an estate tail in the land, gives the whole interest in personal property, which is incapable of being entailed.

Whatever would, directly or constructively, constitute an estate tail in land, will pass an absolute interest in personal estate.

Whenever the words of a will used in a bequest of personal property would, if applied to real property, give an estate tail, they pass an absolute interest in personalty, unless the testator shows a clear intention that they shall not be so construed.

A limitation of personal property after a disposition, that would raise an entail express or implied in real estate, is void, and the person who would be tenant in tail takes the absolute interest.

The words "in default of issue," or "if any," have no restrictive effect.

The word "issue" must be construed as a word of limitation, unless the context of a will affords sufficient reasons to construe it otherwise.

"Issue" will extend to any remote degree, as a description of objects.

The rule of law which construes "issue" as *primâ facie* a word of limitation, rests either on its being derived from the old law, which upon feudal principles was much directed against the successors to real estates taking otherwise than by descent, or on the ground that the word "issue," taken *per se*, includes all the issue, and that the best mode of effectuating the intention in favor of all the issue, is to give an estate tail to the parent, which in course of devolution would embrace them all. A rule resting upon such foundations can have no application to personal estate. — *Re The Trustee Relief Act* (10 & 11 Vict. c. 96), *and Re The Trusts of the Will of John Wynch*, *C. A. C.*

Will — Construction — Dower — Election. A testator by his will gave his personal estate and an annuity to his wife, and devised his real estate to trustees, with power to let the same until all his nephews and nieces were of the age of twenty-one years, after which period he directed that the estates should be sold, and the proceeds go equally amongst his nephews and nieces, share and share alike, except two.

Held, affirming the decision of the court below, that the widow was put to her election between the bequests and the dower.

A power of leasing given to trustees is sufficient to indicate the intention on the part of a testator to exclude his widow from her dower. — *Parker* v. *Sowerby*, *C. A. C.*

Family Arrangement — Compromise of supposed Rights not actually existing; when valid — Mistake. A family arrangement, entered into for the purpose of compromising supposed rights, is not valid in a case in which it afterwards appears that no such rights exist — no doubt as to the existence of such rights having, during the negotiation, presented itself to the mind of the party making the compromise: otherwise,

Semble, such a compromise would have been supported.

By a settlement, lands were limited in strict settlement to A., B., and C., and their issue in tail successively, subject to a trust thereby created for raising, after the death of A., B., and C. respectively, portions for their younger children, to be vested and payable on their attaining twenty-one, with maintenance in the mean time equal to the interest of their shares at the rate of 5*l.* per cent. A. died a bachelor; and B. became tenant for life of the property. C. died in B.'s lifetime, leaving several children. Some years after his death they claimed their right to have their portions raised and paid, with interest, from the death of the father. A compromise was effected between B. and the children of C., by which they agreed to accept a sum less than what would be due to them for arrears of interest (assuming the portions to be raisable during the lifetime of B.); and it was agreed that the portions should be raised within a limited time, with full interest in the mean time. It was afterwards decided by the court that these portions were not raisable.

Held, that the compromise was invalid; and the deed was decreed to be set aside, the court being of opinion, upon the evidence, that, during the whole of the negotiation, a doubt on the question whether the portions were raisable during the life of B. (the plaintiff) had never presented itself to his mind; and that the only question of compromise was the amount of his liability, and the mode in which the claim of the defendants was to be satisfied. — *Lawton* v. *Campion*, *R. C.*[1]

Mutual Accounts — Intricate and Complex Accounts — Bill — Demurrer. An account between an attorney and solicitor and agent and his client and principal of his receipts and payments, for or to or on behalf of the latter,

---

[1] Rolls Court.

and of loans made by the attorney to his client, and of moneys paid by his client to him, and of moneys owing to the attorney from the client in respect of his bills of costs, is not a case of mutual accounts entitling the attorney to a decree for an account.

Upon demurrer, a general allegation that the accounts are of an intricate nature is insufficient to entitle the plaintiff to a decree, but must be supported by specific allegations of facts showing the intricate and complex nature of the accounts. — *Padwick* v. *Hurst*, *R. C.*

Statute of Frauds — Declaration of Trusts under Sect. 7 — Instrument of a testamentary Character. A. purchased real estate, which was conveyed by the vendor to a trustee, to such uses as the trustee should appoint, and in default thereof to the use of the trustee absolutely. The deed has continued in the possession of the trustee, but A. always received the rents. Shortly afterwards A. delivered to the trustee a paper, signed by him, which desired the trustee, after his (A.'s) death, to hold the property, upon certain trusts, for his (A.'s) wife and his children.

Held, that the instrument signed by A., was a good declaration of trust, within the 7th section of the Statute of Frauds, and was not of a testamentary character. — *Tierney* v. *Wood*, *R. C.*

Purchaser without Notice — Prior Mortgage — Deeds left in possession of Mortgagor — Fraud — Laches. S. mortgaged certain property to F. The same solicitor was employed by both parties; he, as the solicitor of the mortgagor, retained the title-deeds, representing to F., that certain documents which he delivered to him were the title-deeds. S. subsequently sold the property to C., who had no notice of the mortgage.

Held, that it was no defence to a bill of foreclosure by F. that C. was a purchaser without notice; also, that F. had not been guilty of laches with respect to the possession of the title-deeds, so as to deprive him of his security.

The property was sold to pay certain legacies charged upon this with other property.

Held, that this did not give the purchaser a good title against F., who was entitled to have the legacies paid out of the other property. — *Colyer* v. *Finch*, *R. C.*

Gift in anticipation of Legacy — Loan — Intestacy. Where a *feme sole*, having made a will giving a legacy to her daughter, at the request of that daughter advanced the amount to the daughter in her lifetime, with a promise that she (the mother) should receive interest for the same for her life, which interest was duly paid, and the mother afterwards revoked her will, and died intestate:

Held, that the advance to the daughter was a loan, and not a gift; and her representative bound to account for the same to the mother's estate. — *Rannie* v. *Chandler*, *V. C. S. C.*[1]

Appointment of Trustees under a Power. A deed of settlement, in which three trustees were named, contained a power of appointment of new trustees, whereby it was provided that, in case the three trustees, or any of them, should die, or be desirous to be discharged, or should neglect or refuse to act, it should be lawful for the husband and wife, and the survivor, to appoint "any other person or persons to be a trustee or trustees for the several purposes aforesaid, in the place or stead of the said trustee or trustees who should so die or be desirous to quit, and be discharged," &c. The husband died, and afterwards two of the trustees; the third was desirous of relinquishing the trusts.

---

[1] Vice Chancellor Stuart's Court.

The widow alone, by deed-poll indorsed on the deed, and in execution of the power, appointed two trustees in the place of the original three.

Appointment confirmed. — *Re Poole Bathurst's Estate, and Re The South Wales Railway Act*, 1845, *and The South Wales (Amendment) Act.* 1846, *ex parte Charles Bathurst, V. C. S. C.*

Miscellaneous Intelligence.

Oaths. — The Court of Appeal has decided that the oath to tell "the whole truth and nothing but the truth," prescribed by the 155th article of the criminal code, and to be taken by witnesses heard before the public tribunals, partakes of a sacramental *formula*, which, by any modification, is rendered a nullity; therefore a judgment, which recites that the oath taken was merely "to tell the truth and nothing but the truth," is void. — *Gazette des Tribunaux, Paris.*

A Woman Apparently White Surrendered to Slavery — Fourth District Court. — A rather singular case came before this court yesterday. Some days since a woman named Pelasgie was arrested as a fugitive slave, who had lived for more than twelve years in this city as a free woman. She was so nearly white, that few could detect any traces of her African descent. She was arrested at the instance of a man named Raby, who claimed her as belonging to an estate of which he is heir at law. She was conveyed to the First District guard-house for safe keeping, and while there she stated to Acting Recorder Filleul, that she was free, had never belonged to Raby, and had been in the full and unquestioned enjoyment of her freedom in this city, for the above-mentioned period. She also stated that she had a house well furnished, which she was in the habit of letting out in rooms. About this time a lawyer appeared before the Recorder, and stated that the woman was born in slavery, and now belonged to a man in Mississippi. He produced a bill of sale which corroborated his assertion, and which stated that in a certain number of years she was to be set free. This being a sort of triangular fight, the woman, Raby, and the lawyer, forming the corners, the Recorder found himself somewhat at a loss what to do, and as Raby pressed his claim, the Recorder advised him to apply to one of the district courts. Accordingly he applied to the Fourth District Court, and took a rule on Acting Recorder Filleul to show cause why a mandamus should not be issued compelling him to deliver up the woman. Mr. Filleul appeared before the court and stated the circumstances mentioned. Judge Reynolds decided, however, that Raby was the owner of the woman, and ordered the rule to be made absolute, and a writ of mandamus to be issued upon Acting Recorder Filleul, for the surrender of the slave. The issuing of the writ, however, was rendered unnecessary by the declaration of Mr. Filleul that the order of the court was sufficient, and that he would at once order the woman's release. Time, however, has been given to her to prove her freedom, and also to the lawyer to prove the validity of the bill of sale. — *N. O. Picayune, Sept.* 6.

Setting a Gander's Leg. — Dr. S. came to settle at Bloomfield, half a mile north of what is now Piety Hill, or Birmingham, in 1820, and commenced farming and the practice of medicine. A year or two afterwards a neighbor, as he was then called, a man who lived about eight miles off, with whom the doctor was at variance, called him about the

middle of a bitter winter night to go to his house and mend a broken leg. The doctor was never backward in obeying a professional call, and was under way in short order. Arriving at the place, he found the patient to be an old gander, who, sure enough, had a broken leg; so he set to work, made splints and bandages, put the leg in place and went home, leaving Mr. Gander as comfortable as could be expected.

In due time the owner of the gander was presented with a bill of $10, for surgical services, which he refused to pay. Dr. S. sued him before a justice, and recovered the amount with costs. The gander appealed, or rather his owner did for him; the judgment was affirmed with new costs. The gander took another and last appeal to the Supreme Court, where the judgment below was affirmed with new costs, from which court an execution issued for $10 damages and $160 costs of suit, which was levied on the farm and finally paid, leaving the world in doubt which was the greater goose of the two. — *Ohio Empire.*

A Scene in Court. — *Court of Exchequer* (before the Lord Chief Baron and Common Juries). — *Chard* v. *Birch.* — Upon this case being called on, Mr. Crosse said he represented the defendant; but he did not see the counsel on the other side present. The plaintiff said his solicitor had been in court till within the last few minutes, when he was obliged to go home from illness; and his counsel were engaged in another court, so that he had no one to appear for him. The Lord Chief Baron: "Then you are an unhappy man." The Plaintiff: "No, my lord, I am not unhappy." (Laughter). The Lord Chief Baron: "Well, then, you are unfortunate; for you are here, when your cause is entered on, without either attorney or counsel. You have a sick attorney, and your counsel are absent. I consider that an unhappy position for a plaintiff to be placed in. The usual mode of proceeding, the jury having been sworn, and your counsel not being present, would be that you should be nonsuited. I am reluctant to put you to the expense of appearing here again, therefore you shall state your own case to the jury, and then, upon being sworn, I will receive your evidence. In order to do this, I must request the learned counsel, who appears for the defendant, to read the declaration and pleas."—*Law Times.*

A Model "Charge." — The following amusing incident transpired at the spring term of the Circuit Court of St. Croix county, Wisconsin.

The Judge of the Circuit Court, lately in session at Hudson, Wisconsin, gave a charge to the jury on a certain action tried before him which excited considerable merriment in the court at the time.

The action was to recover the value of certain liquors sent from below and consigned for sale to the defendant. Evidence was given on the part of the defendant to show that the brandies, &c., were made of 40 cent whiskey, and drugged besides, whereat the judge was very indignant, and charged the jury very nearly as follows:

"*Gentlemen of the Jury:* Pure unadulterated liquor is a wholesome and pleasant beverage, and, as far as the experience of the court extends, conduces to health and longevity; but a bad article of liquor, gentlemen, or, what is worse, a drugged article, cannot be tolerated; and if dealers from below will send up into this beautiful country, so blessed with the smiles of the benignant Creator, such a miserable quality of liquor as the proof shows this to be, in this court, gentlemen of the jury, they cannot recover."

A Coroner's Verdict — Found Bad. The Portsmouth Journal, under the head of traditionary sketches, publishes the following account of a model jury of the olden time.

"About eighty years ago a man came to his end by a casualty at the

Isle of Shoals, and a coroner from Portsmouth visited the island to make an inquest. Twelve jurors were summoned from those who were first met with, and directed to sit on the body. They went into the house, and soon some of them returned, and informed the coroner that he would hold but six. They were again instructed and sent in. They reported that he was drowned. They were again sent back for further investigation. In due time, they returned with the report that they had notched on one stick all his good deeds they could find, and on another all his bad ones. The latter numbered most, and therefore they gave their verdict that he had gone to the wicked place. One of his good qualities was reported to be, that he could carry a can of flip at arm's length around the island, and not spill a drop."

Lawyers' Beards. — Upon All Souls' Day, in the first year of Queen Elizabeth's reign, the judges made an order, which was imperatively enforced in all the inns of court, and gave great offence to the lawyers: "That no fellow of these societies should wear a beard above a fortnight's growth; and that none should wear any sword or buckler, or cause any to be borne after him into town."

Finis Litis. — The Supreme Court of Holland has just decided a case begun in 1420, respecting the boundary between two communes.

Costs. — In an action for £9 odd, originally brought in the Glasgow Sheriff's Court, the united costs have been £220.

Notices of New Books.

Public and Private Laws of the United States of America, passed at the first session of the twenty-third Congress, 1853-1854. Carefully collated with the originals at Washington. Edited by George Minot, Counsellor at Law. Boston: Little, Brown & Co. 1854.

This edition has the stamp of authority, as an evidence that the law makers are satisfied with the clothing of their labors, and is already known as *the* edition of the laws of the United States.

The present number is unusually plethoric, but not so full of interest as of matter. It contains some two hundred and seventy-eight laws, public and private, and twenty-five resolutions, together with treaties and proclamations. By one act of practical interest to lawyers, notaries public are "authorized to take depositions, and do such other acts in relation to evidence to be used in the courts of the United States, in the same manner, and with the same effect as commissioners to take acknowledgments of bail and affidavits may now lawfully take or do."— c. 159, § 2.

An appropriation is made for codifying and revising the revenue laws, perhaps an entering wedge for a more extended system of codification. The Kansas and Nebraska Act looks out from Little & Brown's pages, as innocently as if it had been the bantling of some Arcadian Legislature, instead of that stormy assembly which raged so furiously during the long night, when it struggled into existence.

There is one singular omission in the existing criminal law of the United States, which it may not be out of place to notice here, first brought to our notice, by a recent case in the Circuit Court of the United States for the Massachusetts District. Some months since, one Henry Pease was indicted for the manslaughter of one Lopez, by ill treatment on the high seas, in consequence of which, Lopez died on land, in a foreign

port; but Sprague, J., who was then holding the court, considered this a *casus omissus* in the laws of the United States, and was of opinion that although the court had jurisdiction by statute in a case of murder, where a *malicious* cause of death occurring on the high seas produces death on land, yet it was otherwise as to manslaughter.

CASES IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE THIRD CIRCUIT. Reported by John William Wallace. Vol. II. pp. 616. Philadelphia: T. & J. W. Johnson, Law Booksellers, No. 197 Chestnut street.

This is a valuable addition to an American lawyer's library. We published in our last number a selection from Mr. Wallace's marginal notes, comprising several cases, of more or less interest. In one of them (*Jones* v. *The Ins. Co.*, p. 278,) Judge Grier was called upon to consider the same question which lately came before the English House of Lords, in *Small* v. *Gibson*, 18 Jur. 1131, and before the Supreme Court of Massachusetts, in *Capen* v. *Wash. Ins. Co.*, 16 Law Rep. p. 465, whether there is any implied warranty of seaworthiness in a time policy, and held that none is implied, except under particular circumstances, if at all. The Supreme Court of Massachusetts do not seem to recognize any circumstances, in which a warranty of seaworthiness, "in the ordinary sense of that term," can exist in a time policy. The English decision leaves the point open as to whether such a warranty may not sometimes be implied. It would seem then, that litigation on the subject was not altogether closed. We find opinions also on the Law of Copyright, Collision, Challenge of Jurors, The Fugitive Slave Law, Patents, Treason, &c.

This volume contains some interesting speeches by the Hon. Horace Binney, at meetings of the bar, "on the occasion of the deaths of Charles Chauncey and John Sergeant" — his friends and contemporaries. And in the case of *Cromwell* v. *The Bank of Pittsburg*, p. 569, (we quote from the marginal note,) "The history of records and of the mode of entering judgment in Pennsylvania, is given in detail, . . . and the loose and careless mode of preserving judicial papers and transacting matters of form by judges, prothonotaries, attorneys, and parties in Philadelphia, set forth."

"Usually," says Judge Grier, in his opinion, "where an agreement or acknowledgment, such as is found in this case, has been put on file, the entry made by the clerk on the rough docket, would be 'Sept. 13, 1820, judgment confessed. See paper filed with writ;' . . . And I have known one prothonotary — a very worthy man, but somewhat eccentric in his orthography — who would have made the following minute only, '*Cept.* 13, *Gug*t.'" And, an entertaining note on the case, gives the reader some idea of the manner in which records, those *absolute verities*, are sometimes kept in Pennsylvania.

It is perhaps a legitimate conclusion, from the appearance of Mr. Wallace's volume, that he or his publishers, or both, have an eye to nicety. We wish he would amend his system of nomenclature in admiralty cases. *The Barque Delaware* v. *The Steamer Osprey*, figures in his list. Was the barque a libellant? But we will not enter upon a topic which is elsewhere discussed in our pages, by a correspondent whose nautical and legal experience makes him an authority, and entitles him to be heard in behalf of his clients. It may be a little matter, but little matters are entitled to their share of attention.

DEDICATION OF ANTIOCH COLLEGE AND INAUGURAL ADDRESS OF ITS PRESIDENT, HON. HORACE MANN, with other proceedings. Yellow Springs, Ohio; A. S. Dean. Boston: Crosby & Nichols.

This little volume presents a very favorable specimen of Western typog-

raphy and binding. Its contents consists of a brief narration (omitting dates) of the proceedings at the Dedication of Antioch College, and at the end, a list of the Faculty, a notice of the Preparatory School, a statement of the requisites for admission to the College, and of the undergraduate course, and a short notice of the history and present state of the Institution.

The prominent feature of the book is the Dedicatory and Inaugural Address of the President, Hon. Horace Mann.

This address is very characteristic of its author. It is powerfully written, and presents striking and impressive views on the important subjects of education. We think we can discern a more sober and practical tone of mind in it, than has appeared in most of Mr. Mann's speculative writings while among us, but at the same time, the startling energy of thought and originality of views, heretofore so characteristic of him, are still preserved in all their vigor. The address does not afford sufficient information of the details of the plan of the College, to enable us to enter upon them. The principal novelty is the attempt that is to be made to educate together youth of both sexes, who have passed the term of mere childhood. It is, we believe, an almost untried experiment. If practicable at all, there are certainly some advantages to be derived from the humanizing presence of female influences, but whether it is practicable, we consider a matter of grave doubt.

We take jurisdiction of this little volume, for the purpose of introducing it to our readers, although it is in no way connected with the profession to which our journal is devoted, because the author of the address was once a distinguished member of the Massachusetts bar, and we therefore feel and claim an interest in his future course.

The object of education at the West, is one of the most important that can claim the attention of all true men, not only there, but throughout the Union; for upon the character of the vast future population of the Valley of the Mississippi will depend the destiny of this nation, and the question whether the people can be sufficiently elevated by intellectual, moral, and religious training, to continue capable of permanent self-government. We commend this address and the enterprise to the attention of our readers, and wish Mr. Mann and his fellow-laborers, all the the success which their intentions and efforts may deserve.

COMMENTARIES ON THE JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES. Vol. I.; containing a View of the Judicial Power, and the Jurisdiction and Practice of the Supreme Court of the United States. By GEO. TICKNOR CURTIS, Counsellor at Law. Philadelphia: T. & J. W. Johnson. 1854. pp. 635. 8vo.

Mr. Curtis, who amid the cares and occupations of an extensive practice, finds time always for professional authorship, has here presented to the profession a well considered and carefully prepared treatise, on a subject of general interest to the American lawyer. The judicial power of the United States, and the jurisdiction and practice of the Supreme Court, form important departments of constitutional law — a branch of law marked by the finest distinctions, and resting upon the most profound principles — which has engaged the best faculties of the best minds among us, and in which the most splendid professional triumphs have been won. It is, however, well understood by but few members of the profession; and, in general, loose and inaccurate notions prevail in regard to it; and Mr. Curtis's book will be of much service, by the clear and luminous exposition it contains of matters interesting not merely to the lawyer, but also to the statesman and the patriot.

The work is divided into two books. The first book, distributed into seven chapters, treats of the judicial power of the United States, under the

several heads of cases arising under the constitution, laws and treaties of cases affecting ambassadors, other public ministers, and consuls, cases of admiralty and maritime jurisdiction, controversies to which the United States shall be a party, controversies between two or more States, the meaning, distribution, and exercise of the judicial power.

The second book is divided into nine chapters, and treats of the jurisdiction and practice of the Supreme Court of the United States. The first chapter is upon the original jurisdiction and practice of the Supreme Court of the United States; the second, third, fourth, and fifth chapters, are upon the appellate jurisdiction of the Supreme Court with reference to the Circuit Courts, to the Circuit Court of the District of Columbia, to the State Courts, and of the special appellate jurisdiction of the Supreme Court in Florida, Louisiana, and California land claims. The sixth, seventh, eighth, and ninth chapters treat of the practice of the Supreme Court in writs of error, in equity and admiralty appeals, in cases certified on division of opinion, and in cases of original jurisdiction. There is a supplement, containing an abstract of the cases in the 15th of Howard, bearing upon the topics discussed in the main body of the work, and an appendix of rules and orders and forms.

The substance of the work has been gathered from the laws and constitution of the United States, and the various decisions of the courts of the United States in illustration thereof. The examination of these, by Mr. Curtis, has been minute, patient, and exhausting; and the results of his investigations are presented with logical method and discriminating analysis. His style is clear, precise and accurate; his grasp of legal principles is vigorous; and his statement of legal points and distinctions is luminous. In constitutional interpretation, his views are of the school of Marshall, Story, and Kent; but whenever he has occasion to express dissent from a judicial opinion or observation, it is done with that propriety and decorum which the relation between the bar and the bench so imperatively requires. The constitutional lawyer will read with peculiar interest the chapter on the appellate jurisdiction of the Supreme Court of the United States, with reference to the State Courts — the longest and most elaborate in the volume — in which the subject of the obligation of contracts and of the distinction between the obligation and the remedy of a contract is treated with great accuracy of statement and fulness of research. The chapter on the special appellate jurisdiction of the Supreme Court in Florida, Louisiana, and California land claims, will be curious and new to most of the profession, in the Northern States at least.

Mr. Curtis announces in his preface, that the second volume of his work will embrace the jurisdiction and practice of the Circuit and District Courts. We congratulate him and the profession alike, on the industry and thoroughness with which his task thus far has been completed; and when his whole plan shall have been accomplished, he will have finished a work honorable to himself and useful to his brethren.

As a specimen of Mr. Curtis's style and manner, we cite a paragraph in which he discusses the right of a State to extinguish a franchise by the exercise of the right of eminent domain — one of those points on which judges and statesmen will differ, according to the character of their minds and the political schools in which they have been trained.

"The case in which the power of a state to resume or extinguish a franchise, by the exercise of the eminent domain, was thus affirmed not to be within the provision of the Constitution of the United States respecting the obligation of contracts, was a case where the legislature of Vermont had, in 1795, incorporated a company for the purpose of building and maintaining a toll-bridge; and long afterwards, by certain proceedings under the general laws of the state, enacted in 1839, a public road was laid out between certain termini, passing over and upon the plaintiffs' bridge, and thus converting it into a free public highway; compensation being as-

sessed and awarded to them for this appropriation of their property, and for the consequent extinguishment of their franchise. The charter of incorporation had confined the plaintiffs' right of erecting and maintaining a toll-bridge to a particular spot, directing it to be where a road was directed to be re-surveyed by an act passed at the same time. It is difficult to be satisfied with the reasoning employed by any of the learned judges in this case. The ground upon which the decision was placed, by a majority of the court, was that above stated; and it rests, in substance, upon the position that, as the power of eminent domain is part of the fundamental law of the state, applicable to all property, the contract by which a franchise is created must be held to be made with reference to this known and universal power of the government, and upon the condition that it is to be exercised when occasion calls for it. But, it may be respectfully suggested that what was extinguished or taken away, in this case — the franchise itself — was the thing created by the contract, and the right to enjoy which was the thing stipulated; that the case differs from that of the Charles River and Warren bridges, in this, that in the latter case the value only of the franchise was impaired, but the franchise itself was not taken or extinguished; and that to hold that the subject-matter of its grant may be taken or extinguished by the state, under its power of eminent domain, when it cannot be resumed by the law-making power alone, without touching the obligation of the contract, is to hold that the right of the eminent domain enters into the contract, as one of its conditions, while the ordinary legislative power is excluded from it. And this we understand to be the view of the court; for it is said that the power of eminent domain is paramount to all private rights vested under the government, and, moreover, that the grant of a franchise is made with reference to it as 'an essential and inseparable condition,' growing out of the higher authority of the paramount law of the state. Now, this broad and very important question, whether and to what extent, the law of the state enters into and forms part of the obligation of a contract, by tacit reference or presumption, so as to regulate or fix the stipulations of the parties upon points on which the contract does not expressly speak, is a question that has not received so full and satisfactory an elucidation, in our constitutional discussions, as to warrant all the conclusions that may follow from a denial or affirmance of the general proposition. That the law which regulates or vests in the state the power of eminent domain, or the power itself, is of a more high or sacred character than any other law on which any of the other powers of government depend, or than those other powers themselves, so that it may be supposed to be peculiarly in the contemplation of the parties to such a grant, while the ordinary legislative power is not, it is difficult to affirm. It is difficult to see why a state can resume or destroy the subject of its grant, by a legislative act, which involves the exercise of the power of eminent domain, when it cannot do it by a simple repeal of the grant under the legislative power, upon the ground that the contract in the grant is made upon the condition that the one power may be exercised, and that the other may not be. All the powers of government are held in trust for the public, and all are equally to be presumed to be exercised for public purposes and objects. The simple repeal of a charter of incorporation, or other legislative grant, may be as much for the public convenience or necessity, as the extinguishment of the franchise by an act which takes it, under the power of eminent domain, for public uses; and when the charter is silent with regard to the exercise of both powers, it is difficult to see why one is within the obligation of the contract and the other is not, upon any notion of a tacit reference by the parties, through which the state obtains a reservation of power in one form, which it does not possess in another. The real question would seem to be, Has not the state, by creating a franchise, stipulated that it shall continue to exist and be enjoyed, as against *all* the legislative powers of government, and against all other powers, except those which rest upon the *salus populi suprema lex?* That there is a distinction between the franchise of a corporation and its property, in respect to the contract of the state and the corporators, as including or excluding any of the powers of government by its obligation, would seem to be clear, from the fact that the franchise is created by the grant, and its existence and enjoyment constitute the thing stipulated; whereas the property, however acquired, is only the means by which the franchise is exercised and enjoyed. Whether the franchise itself can be resumed, or destroyed, or extinguished, by the exercise of any merely legislative power, whether in the right of eminent domain, or in any other mode of promoting the public convenience, must depend, it is suggested, upon the great question, how far and in what sense the existing law, whether fundamental, natural, or positive, enters into a contract. A further discussion of this and some of the other questions involved, might, it is conceived, lead to other conclusions as to the power of a state to take for public uses the franchise of a corporation, than those which at present constitute the doctrine of the court." — § 250.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Bacon, Albert K.	Ware,	Sept. 27, 1854.	Haynes H. Chilson.
Bailey, Edmund C.	Springfield,	" 25,	Henry Vose.
Beals, Wm.	Boston,	" 2,	John P. Putnam.
Bird, Edward B.	Stoughton,	Oct. 7,	Samuel B. Noyes.
Bond, Emilius	Palmer,	" 14,	Henry Vose.
Boston Carpet Company	Roxbury,	Sept. 4,	Francis Hilliard.
Briggs, John R.	Springfield,	Oct. 10,	Henry Vose.
Brown, George W.	Stoughton,	Sept. 16,	Samuel B. Noyes.
Brown, Wm. F.	Southbridge,	" 27,	Alexander H. Bullock.
Butler, Edwin	Springfield,	" 30,	Henry Vose.
Clarke, Eugene	Quincy,	" 18,	Francis Hilliard.
Drew, George A.	Boston,	" 4,	John M. Williams.
Edgarton, Wm. W.	Shirley,	" 2,	Isaac S. Morse.
Fales, Levi S.	Chelmsford,	" 2,	Isaac S. Morse.
Fitts, Abraham	Worcester,	" 4,	Alexander H. Bullock.
Foster, Wm.	Danvers,	" 26,	John G. King.
Foxcroft, Isaac C.	Dedham,	" 26,	Samuel B. Noyes.
Franklin, J. D.	Wrentham,	" 19,	Francis Hilliard.
Fulton, James K.	Roxbury,	" 11,	Francis Hilliard.
Gay, Charles	Stoughton,	" 25,	Samuel B. Noyes.
Glover, George W.	Adams,	" 18,	Shepard Thayer.
Gould, Charles P.	Salem,	" 21,	John G. King.
Granger, David A.	Charlestown,	" 8,	Asa F. Lawrence.
Ingerson, Nathaniel	Lowell,	" 21,	Isaac S. Morse.
James, Nathan P.	Chicopee,	Oct. 7,	Henry Vose.
Kern, Martin L.	Sandwich,	Sept. 25,	Timothy Reed.
Ladd, J. I.	Groveland,	" 20,	John G. King.
Lloyd, Elijah	Blandford,	Oct. 12,	Henry Vose.
Locke, Elbridge G.	Lexington,	Sept. 5,	Asa F. Lawrence.
McCaskell, John	Boston,	" 5,	John P. Putnam.
Mead, John A.	Stoughton,	Oct. 2,	Samuel B. Noyes.
[1]Milady, Michael	Roxbury,	" 6,	Samuel B. Noyes.
Minot, Willard	Lowell,	Sept. 5,	Isaac S. Morse.
Morse, Russell W.	West Bridgewater,	" 5,	Welcome Young.
Nelson, Myron E.	Coleraine,	" 30,	David Aiken.
Nichols, Alvin	Barnardston,	" 25,	David Aiken.
[1]O'Conner, Thomas	Roxbury,	Oct. 6,	Samuel B. Noyes.
[2]Perkins, John J.	Dana,	Sept. 23,	Alexander H. Bullock.
Pillsbury, Aaron N.	Georgetown,	" 1,	John G. King.
[2]Procter, Samuel	Essex,	" 23,	Alexander H. Bullock.
Ricketson, Saml. G.	Roxbury,	" 7,	Francis Hilliard.
Rogers, Timothy B.	Boston,	" 9,	John P. Putnam.
Searl John H.	Lowell,	" 4,	Isaac S. Morse.
Skinner, Bridget A.	Boston,	" 6,	John P. Putnam.
Small, Joshua	Harwich,	" 19,	Timothy Reed.
Spring, Edward	Boston,	" 9,	John P. Putnam.
Thompson, Cyrus H.	Fitchburg,	" 19,	C. H. B. Snow.
Thornton, William	Grafton,	" 30,	Alexander H. Bullock.
Tyler, John S.	Boston,	" 16,	John M. Williams.
Washburn, David	Natick,	" 12,	Asa F. Lawrence.
West, Daniel	Lowell,	" 18,	Isaac S. Morse.

[1] Milady & O'Conner.

[2] John J. Perkins & Co., business at Dana.

In the list of insolvents in our October Number, for "Sept. 8," in the 9th line of dates, read "Sept. 5;" for "Walter A. Henderson," read "Walter, O.;" for "McKenrea," read "McKenna;" for "Merrill, Lewis Jr." read "Lewis F."

The commissioners will confer a favor on those who have occasion to refer to this list, by making their returns as legible as possible.